Penn, Zenger and O.J.: Jury Nullification - Justice or the "Wacko Fringe's" Attempt to Further Its Anti-Government Agenda?

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Mr. Cochran: [A]nd when you enter a not guilty plea, since the beginning of the time of this country, since the time of the magna carta, that sets the forces in motion and you have a trial.

This is what this is about. That is why we love what we do, an opportunity to come before people from the community, the consciences of the community. You are the consciences of the community. You set the standards. You tell us what is right and wrong. You set the standards. You use your common sense to do that.

Who then polices the Police? You[, the jury,] police the Police. You police them by your verdict. You are the ones to send the message. Nobody else is going to do it in this society. They don't have the courage. Nobody has the courage.

They have a bunch of people running around with no courage to do what is right, except individual citizens. You[, the jury,] are the ones in war, you are the ones who are on the front line.

These people set policies, these people talk all this stuff, you implement it. You are the people. You are what makes America great, and don’t you forget it.

Ms. Clark: I have never had a defense attorney make an argument like Mr. Cochran made, nor have I ever seen a defense attorney get up and ask for jury nullification in this way.

The Court: It was very artfully phrased.
INTRODUCTION

In *People v. Simpson*, defense attorney Johnnie Cochran ("Cochran") launched a flurry of debate within the legal profession and the general community with his remarks in closing. Many commentators argued that Cochran was sending a message to the jury that even if it believed Simpson to be guilty, it could still find him not guilty by nullifying the law. While Cochran's remarks led to an uproar about "playing the race card," the concept of jury nullification is centuries old. Law students are taught that a jury finds the facts and the judge declares the law—however, the strength of this statement has varied throughout history.

Part I of this comment begins by discussing what is meant by the doctrine of jury nullification. Part I then reviews the history of jury nullification in England, the American Colonies and the United States. In Part II, arguments against the use of jury nullification are reviewed. Finally, Part III argues that jury nullification should be allowed by courts, and concludes that juries have both the power and the right to nullify laws they find unjust and oppressive.

I. JURY NULLIFICATION

A. The Doctrine of Jury Nullification

The doctrine of jury nullification is based on the notion that "jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences, and the defendant has the right to have the jury so instructed." The arguments concerning jury nullification do not pertain to the "power" that a jury has; rather they concern the right to nullification instructions and defense arguments. That is, most jurists agree that when a jury renders a general verdict

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6. Pennsylvania Supreme Court Justice Mitchell noted that "[t]he rule, ad questionem facti non respondent judices, ad questionem juris non respondent juratores, was an ancient maxim in the days of Coke." *Commonwealth v. McManus*, 21 A. 1018, 1020 (Pa. 1891) (Mitchell, J., concurring).
in a criminal case, whether proper or not, the jury has the “power” to disregard the law as given by the court and render a verdict. The “power” emanates naturally from the jury system, which does not require the jury to explain its finding. The issue is whether a defense lawyer may make the jury aware of its power to nullify the law as given by the court.

Some commentators draw a distinction between what they deem “historical jury nullification” and “modern justice-oriented jury nullification.” These commentators define historical jury nullification to mean that jurors have the right to determine the law because they are the conscience of the community and they know what the law should be. These commentators argue that today jury nullification proponents advocate “modern justice-oriented jury nullification” which they define as meaning that the jury should have the power to determine whether a particular law should be applied to the case under consideration. The commentators appear to draw this distinction by stating that historical nullification cases dealt with juries that nullified oppressive and unconscionable laws, while modern nullification seeks to allow a jury to acquit a defendant because it would be unjust to convict the defendant. This is a distinction without a difference: who is to say whether a law is oppressive, unconscionable or unjust? American jurists review early American history and note that the English laws that English and colonial juries refused to apply were oppressive, but then reason that today the United States Government would not allow oppressive or unfair

9. Scott, supra note 8, at 391 (“The criminal trial jury’s power to nullify is unquestionable.”).
11. Creagan, supra note 7, at 1102.
12. Id. at 1114 n.84. The commentators cite as examples of historical nullification: The Trial of Mr. John Lilburne, 5 Howell, Cobbett’s Complete Collection of State Trials 407 (Old Baily 1653) (the jury refused to apply an act of Parliament that banned Lilburne from ever returning to England) [hereinafter Howell’s St. Tr.], The Trial of William Penn and William Mead, 6 Howell’s St. Tr. 951 (Old Baily 1670) (the jury refused to convict under the seditious libel laws even though publication was proven) [hereinafter Penn & Mead’s Case] and The Trial of Mr. John Peter Zenger, 17 Howell’s St. Tr. 675 (K.B. 1735) (the jury refused to convict under the seditious libel laws).
13. Creagan, supra note 7, at 1114. Commentators cite United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) as an example of modern justice-oriented jury nullification. In Dougherty, the defendants were charged with breaking into the Dow Chemical Company. Dougherty, 473 F.2d at 1117. The break-in was to protest Dow’s involvement with the Vietnam War. Id. at 1120. The defendants argued to the court that their actions were proper because of Dow’s involvement in the Vietnam War. Id. The court refused to instruct the jury that it could nullify the laws based on “moral compulsion” or based on a “choice of the lesser evil.” Id. at 1121.
laws to be passed and applied—that is an untenable position. Therefore, this comment addresses jury nullification as a doctrine that gives the jury the right to nullify laws that it finds oppressive, unconscionable or overly harsh.

B. Jury Nullification in English History

Although the uproar ensuing from Johnnie Cochran's remarks in the O.J. Simpson trial make it appear that Cochran was earning his pay by formulating an original argument, history demonstrates that the doctrine of jury nullification has been around for centuries.

The first noted attempt to inform a jury of its right to determine the law was in 1649. Lieutenant Colonel John Lilburne was accused of treason for publishing pamphlets that criticized the English Government. Lilburne, while not questioning the validity of the law, asked to have counsel assist him in his defense, but when the court denied his request, Lilburne asked to address the jury. Lilburne asked the court to allow him to explain to the jurors that they were the finders of law as well as fact. The court summarily rejected Lilburne's statement, but Lilburne did argue the proposition in his closing remarks. The jury quickly acquitted Lilburne, although it is unknown if the acquittal was based on fact or law.

In a subsequent trial in 1653, Lilburne was again tried, and, he directly questioned the lawfulness of the act he was accused of violating. Historians explain Lilburne's defense as arguing

14. The Trial of Lieutenant-Colonel John Lilburne, 4 HOWELL'S ST. TR. 1270, 1292, 1320-28 (Old Baily 1649). Lilburne, a leader of the Levellers, was tried for treason. Scott, supra note 8, at 397. The Levellers was a political group that advocated universal male suffrage and was opposed to the "centralized bench at Westminster and its elitist legal profession." Id. at 397 n.46.

15. Lilburne, 4 HOWELL'S ST. TR. at 1292-1318.

16. Id. Lilburne asked that he might address the jury:

[T]hat I may speak in my own behalf unto the jury, my countrymen; upon whose consciences, integrity and honesty, my life, and the lives and liberties of the honest men of this nation, now lies; who are in law judges of law as well as fact, and you [the court] only the pronouncers of their sentence, will and mind . . . .

Id. at 1379.

17. Id. at 1379.

18. Id. at 1405. Interestingly, after the acquittal, a medal was created with the inscription: "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact." Scott, supra note 8, at 399.

19. The Trial of Mr. John Lilburne, 5 HOWELL'S ST. TR. 407 (Old Baily 1653). Lilburne had been banished from England by Parliament because of his criticisms of Parliament. Scott, supra note 8, at 401. An act issued by Parliament declared that if Lilburne was found in England he could be tried and executed. Id.
that juries have the right to review a statute and acquit a defendant if the jury finds that the statute is void.\textsuperscript{20}

In 1670, it was the jury that exercised the right to nullify a law and acquit two defendants. William Penn and William Mead were arrested and indicted for "preaching" before an unlawful assembly.\textsuperscript{21} Penn and Mead did not question the evidence presented at trial, but rather alleged that no law existed which prohibited their conduct.\textsuperscript{22} After a short deliberation, eight jury members returned, but four refused to return.\textsuperscript{23} The jury was threatened and ordered to further deliberate.\textsuperscript{24} Upon return, the jury found Penn guilty of speaking but refused to state whether the assembly was unlawful.\textsuperscript{25} The court then threatened the jury and told it to return with a verdict that the court would accept.\textsuperscript{26} Notwithstanding this barrage by the court, the jury stood its ground and acquitted both defendants.\textsuperscript{27} The court responded by fining each juror forty marks and placing them in prison until

\textsuperscript{20} Creagan, \textit{supra} note 7, at 1104. Lilburne's defense is described as arguing: [T]hat the jury had the right and duty to judge a statute or an indictment in the light of English fundamental law and to acquit the defendant if, despite a judicial charge to the contrary, the jury found that the statute was void. Moreover, Lilburne now asserted that the jury ought to acquit the defendant if it believed that the prescribed punishment was unconscionably severe in light of the acts proved to have been committed by the defendant. The jury test the "legality" of the indictment and decide the fairness of the prescribed punishment. \textit{Id.} (citing \textsc{Thomas A. Green, Verdict According to Conscience} 159-60 (1985)).

\textsuperscript{21} Penn \\& Mead's Case, 6 \textsc{Howell's St. Tr.} at 951, 954-55 (Old Bailey 1670). Penn and Mead were Quakers who attempted to enter their normal meeting place but found they were locked out, so Penn started to preach to the large crowd gathered outside. \textit{Penn \\& Mead's Case, 6 Howell's St. Tr.} at 954-55.

\textsuperscript{22} \textit{Id.} at 958-59. Penn stated: "The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer to say it is the common-law, unless we knew both where and what it is." \textit{Id.} at 959. The Recorder responded: "You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 to 40 years to know, and would you have me tell you in a moment?" \textit{Id.} Penn replied: "Certainly, if the common law be so hard to be understood, it is far from being very common." \textit{Id.} The court then had Penn, whom the court termed a "troublesome fellow," removed from the court room. \textit{Id.}

\textsuperscript{23} \textit{Id.} at 961.

\textsuperscript{24} \textit{Id.} at 963-67.

\textsuperscript{25} \textit{Id.} at 962-63.

\textsuperscript{26} \textit{Penn \\& Mead's Case, 6 Howell's St. Tr.} at 962-63. The Recorder of the court told the jury:

\[\text{You shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the courts; we will have a verdict by the help of God, or you shall starve for it.}\]

\textit{Id.} at 963.

\textsuperscript{27} \textit{Id.} at 966.
the fine was paid.\textsuperscript{28}

Edward Bushell was one of the jurors on Penn’s and Mead’s jury that refused to convict.\textsuperscript{29} The jurors were charged with finding a verdict against the full and manifest weight of the evidence and the return of an acquittal against the direction of the court in a matter of law.\textsuperscript{30} Bushell and the other jurors filed a writ of habeas corpus to terminate their imprisonment.\textsuperscript{31} Bushell was acquitted on both charges. The court, in discussing the first charge, reasoned that a juror should only be fined if the juror renders a verdict that is contrary to his own beliefs.\textsuperscript{32} Addressing the second charge, the court reasoned that the law cannot be determined until the facts are found, therefore, a judge cannot state the law because the judge cannot determine the facts.\textsuperscript{33} Many commentators use Bushell to advance the argument that jury nullification is a historic right.\textsuperscript{34}

In 1783, in \textit{Rex v. Shipley},\textsuperscript{35} a criminal case brought under seditious libel laws, Justice Buller instructed the jury that the question of libel is a question of law to be decided by the court.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 967-68.
\item \textsuperscript{29} Case of the Imprisonment of Edward Bushell, 6 \textit{Howell's St. Tr.} 999 (C.P. 1670).
\item \textsuperscript{30} \textit{Bushell}, 6 \textit{Howell's St. Tr.} at 1002.
\item \textsuperscript{31} \textit{Id.} at 999-1000.
\item \textsuperscript{32} \textit{Id.} at 1020. Chief Justice Vaughan stated: “[A] perjury \textit{in facie curie} is punishable by the judge; and such is it if jurors go against their evidence; perhaps a witness may be punished for perjury \textit{in facie curie} (which I will not maintain to be law) but a jury can never be so punished, because the evidence in court is not binding evidence to a jury, as hath been shewed.” \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 1010. Chief Justice Vaughan stated:
Without a fact agreed, it is as impossible for a judge, or any other, to know the law relating to that fact or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, qua judge, cannot know the fact possibly but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

\textit{Id.}
\item \textsuperscript{34} See Creagan, supra note 7, at 1106, 1107 n.34.
\item \textsuperscript{35} 21 \textit{Howell's St. Tr.} 847 (K.B. 1783).
\item \textsuperscript{36} Shipley, 21 \textit{Howell's St. Tr.} at 949. Seditious libel is a written communication that is intended to provoke the masses to unlawfully change the government. \textit{Black's Law Dictionary} 1357 (6th ed. 1990).

The jury found the defendant "guilty only of publishing;" however, after further instructions from the court, the jury formulated the verdict as: "Guilty of publishing; but whether a libel or not the jury do not find." Thomas Erskine, who represented William Shipley, argued for a new trial on the ground that the jury had the power and the right to decide the law and the lower court erred in instructing the jury that the question of libel was not for the jury's determination. Lord Mansfield refused to accept Erskine's logic and reasoned that precedence must be followed and therefore the question of libel is an issue of law for the court. Justice Willes dissented and stated that he believed the jury had both the power and the right to decide the law.

Lord Mansfield's opinion outraged many who still believed that juries needed to have the right to decide issues of law. In 1792, Parliament responded by passing a statute titled "An act to remove doubts respecting the functions of juries in cases of libel." Mr. Fox, in introducing the bill, noted that if juries have the power to nullify laws, such a power must be meant to be used. Lord Blackburn, of the House of Lords, noted that the

37. Shipley, 21 Howell's St. Tr. at 950-55.
38. Id. at 956-70.
39. Id. at 970, 1031-41. Because neither the judge nor the jury had decided whether the statements were libelous, the judgment was eventually arrested because, as found in the indictment, it was not libel. Id. at 1042-46.
40. Id. at 1040-41. Justice Willes stated:

[1]T]hat upon a plea of Not guilty, or upon the general issue on an indictment or information for a libel, the jury had not only the power, but a constitution-al right, to examine, if they thought fit, the criminality or innocence of the paper charged as a libel; declaring it to be his selected opinion, that, notwithstanding the production of sufficient proof of the publication, the jury might upon such examination acquit the defendant generally, though in opposition to the directions of the judge.

Id.

41. Scott, supra note 8, at 416.
42. Sparf & Hansen, 156 U.S. at 134. The statute was commonly referred to as "Fox's Libel Act." Id. The act stated:

[1]t be competent to the jury impaneled to try the same to give their verdict upon the whole matter put in issue; . . . [and is] therefore declared and enacted that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . and shall not be required or directed, by the court or judge . . . to find the defendant or defendants guilty . . . .

Id. at 134-35.
43. Id. at 136. Mr. Fox stated:

[1]f a power was vested in any person, it was surely meant to be exercised; [that] there was a power vested in the jury to judge the law and fact, as often they were united, and, if the jury were not to be understood to have a right to exercise that power, the constitution would never have entrusted them with it; but they knew it was the province of the jury to judge of law and fact, and this was the case, not of murder only, but of felony, high treason,
Parliament “adopted almost the words and quite the substance” of Justice Willes statement quoted earlier in Shipley. Justice Gray, dissenting in Sparf & Hansen, argued that the statute was designed to declare that juries have the ability to judge both matters of law and fact.

C. Jury Nullification in Colonial America

In Colonial America, colonial lawyers and jurors believed in and made extensive use of jury nullification to oppose oppressive British laws. In 1735, John Peter Zenger (“Zenger”) was arrested and tried under seditious libel laws. Under the seditious libel laws, truth was not a defense. Zenger’s attorney, Andrew Hamilton, argued that the jury had the “right, beyond all dispute, to determine both the law and the fact” and conclude that truth was a viable defense. Hamilton's strategy was to concede the factual question of whether publication had occurred, and argue the legal question of whether truth should be a defense. Because it was settled law that truth was not a defense in a prosecution for seditious libel, Hamilton argued that the question of libelousness should be decided by the jury. Hamilton extensively quoted parts of Bushell to the jury and argued that the court, by declaring what was libel, had taken away the jury’s power to apply the law to the facts. Hamilton implored the jury to nullify the law and acquit his client. Although the court instructed the jury that the law is for the court to decide, the jury agreed with Hamilton’s argument and quickly returned a

and of every other criminal indictment [and that] it must be left in all cases to a jury to infer the guilt of men, and an English subject could not lose his life but by a judgment of his peers.

Id. (citation omitted).

44. Id. at 134 (citation omitted). See supra note 40 for Justice Willes’ comments.

45. Sparf & Hansen, 156 U.S. at 135 (Gray, J., dissenting).


47. Creagan, supra note 7, at 1109.

48. Zenger, 17 Howell’s St. Tr. at 706. Had the jury followed the court’s instructions, a finding of guilty would have been automatic. Scheffin, supra note 46, at 173.

49. Zenger, 17 Howell’s St. Tr. at 693-94.

50. Id. at 706-22.

51. Id. at 716-18.

52. Id. at 721-22.
verdict of not guilty. 53

When the American Colonies declared independence, the doctrine of jury nullification continued to be argued to, and used by juries. In 1794, in **Georgia v. Brailsford,** 54 United States Supreme Court Chief Justice John Jay instructed the jury on the appropriate law to be applied to the facts. 55 The Chief Justice then added that the jury had the right to decide both the proper law as well as the facts. 56 Many commentators argue that **Brailsford** clearly demonstrates the Supreme Court's early view that juries have the right to determine the law. 57

Two other examples of Colonial America's attitude toward jury nullification are found under the Embargo Law and the Fugitive Slave Law. In 1808, a defendant was charged with violating the Embargo Law. 58 The defendant was clearly guilty under the law, but his attorney vehemently argued that the law was unconstitutional even though the judge had previously determined that the law was constitutional. 59 Another example of juries' willingness to nullify laws is found in cases under the Fugitive Slave Law. 60 Many people were opposed to the law on moral grounds, which made most prosecutions under the law unsuccessful. 61

Not until the late 1800's did evidence of judicial restraint

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53. Id. at 722-23.
54. 3 U.S. (3 Dall.) 1 (1794).
55. **Brailsford**, 3 U.S. (3 Dall.) at 4-5.
56. Id. The Chief Justice stated: "But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you[, the jury,] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." Id.
57. **Brailsford** was a civil trial that fell under the original jurisdiction of the United States Supreme Court. Schefflin, **supra** note 46, at 175.
59. Professor Simson repudiates this conclusion and notes that one of the justices that heard **Brailsford**, Justice Patterson, rejected **Brailsford's** instruction in a later case and told the jury that it could not question the constitutionality of the Sedition Act of 1798. Id. at 500 (citing Lyon's Case, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646)).
60. The Fugitive Slave Law was passed in 1850 and made it illegal to aid runaway slaves. Schefflin, **supra** note 46, at 177.
61. Schefflin, **supra** note 46, at 177.
emerge. Four cases appear to reject the doctrine of jury nullification. In *United States v. Battiste*, Battiste was a crewman on the United States Ship America. The ship was under contract to transport African slaves between points on the African coast. Battiste was charged under a United States law that prohibited any United States ship from transporting individuals with the intent to make them slaves. Justice Story, in concluding the charge to the jury, stated that he disagreed with Battiste's counsel and rejected the argument that the jury could decide the law. The court reasoned that while juries may have the ability to nullify laws, they do not have the moral right to take such actions.

In *Commonwealth v. Porter*, the Massachusetts Supreme Court specifically stated that a jury could not determine questions of law. Although the holding in *Porter* did not follow the prior cases in Massachusetts, its effect was limited. In practice, the result was that while the judge gave the jury the law, the defense attorney was still permitted to argue the law to the jury, ostensibly so the jury would better understand the law.

63. *Battiste*, 24 F. Cas. at 1043.
64. *Id.* Slaves were transported along the coast of Angola, a Portuguese possession, in 1835. *Id.* Neither the owner of America, its captain, nor Battiste had any monetary interest in the slaves, nor did they cause the slavery. *Id.* at 1043-44. The America was merely hired by the slave owners to transport the slaves. *Id.* At this time in history slavery was still legal in the Portuguese province. *Id.* at 1045.
65. *Id.* at 1044. The law that Battiste was charged under read:
That if any citizen, &c. or any person whatever, being of the crew or ship's company of any ship or vessel, owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories, with intent to make such negro or mulatto a slave; or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto, on board of any such ship or vessel, with intent as foresaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death.
*Id.* (citation omitted).
66. *Id.* at 1043. Justice Story stated: "My opinion is, that the jury are no more judges of law in a capital case or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue." *Id.*
67. *Id.* The court was concerned that if a jury could decide the law, the law would become uncertain. *Id.* The court also was concerned that if the jury erred, the injured party would have no redress. *Id.*
68. 10 Mass. (Met.) 263 (1845).
69. Scheflin, supra note 46, at 178.
70. *Id.*
71. *Id.* In fact, opposition to the *Porter* decision was so adamant that at the Massachusetts Constitutional Convention of 1853 an amendment was introduced that would have overruled *Porter*. *Id.* The amendment was eventually defeated, but a statute was later passed with the same purpose. *Id.* Ironically, a short time later,
In *United States v. Morris*, the defendant was prosecuted under the Fugitive Slave Acts. One of the defendant's attorneys, in addressing the jury, stated that it was the finder of the law and if any of the jurors believed the Fugitive Slave Acts was unconstitutional, the jury was obligated to disregard the court's instructions. The court stopped the attorney from continuing this argument to the jury, but the court allowed the attorney to argue out of the presence of the jury, and then the court ruled on the argument. Justice Curtis, writing for the court, reviewed the attorney's argument and cases that supported and opposed the argument and concluded that juries do not have the right to decide questions of law.

Justice Curtis started his analysis with Article VI of the United States Constitution and reasoned that the Constitution requires that all actions by the government should apply equally to all citizens wherever located. He also noted that Article VI binds judges by the Constitution, but noted that there is no such requirement on jurors. In discussing *Bushell*, Justice Curtis dismissed it merely as holding that a juror cannot be prosecuted for a verdict because it cannot be determined if the juror believed or disbelieved the testimony. In discussing *Rex v. Shipley* and Fox's Libel Act, the justice noted that although the language of Fox's Libel Act appears to give the jury the right to decide the law, the justice concluded that the Act had just the opposite meaning.

Chief Justice Shaw held that the statute merely codified the common law as articulated in *Porter*. *Id.* at 178-79.

72. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

73. The Fugitive Slave Acts were passed by Congress in 1783 and 1850 and regulated the surrender and deportation of escaped slaves who fled into another territory, normally a "free" state. BLACK'S LAW DICTIONARY 671 (6th ed. 1990).

74. *Morris*, 26 F. Cas. at 1331.

75. *Id.*

76. *Id.* at 1331, 1336.

77. Article VI, Section 2 reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

78. *Morris*, 26 F. Cas. at 1332. The justice stated: "[W]hatever was done by the government of the United States should be standing laws, operating equally in all parts of the country . . . and binding to the same extent, and with precisely the same effect, on all." *Id.*

79. *Id.* at 1332-33.

80. *Id.* at 1333.

81. *Id.* Justice Curtis stated:

The defendant's counsel argued that this law had declared that, on trials for libel, the jury should be allowed to pass on law and fact, as in other
an Ohio case and an Act of Congress to support his position. The justice summarily dismissed Chief Justice Jay's remark in *Georgia v. Brailsford*, stating simply that he doubted the accuracy of the reported case.

Finally, the watershed American jury nullification case was *Sparf & Hansen v. United States.* In *Sparf & Hansen*, the jury deliberated in a case involving two sailors accused of murder on the high seas. The law under which they were prosecuted allowed a jury to find defendants guilty of a lesser included offense; however, in *Sparf & Hansen* the trial judge instructed the jury that the evidence did not support a finding of a lesser included offense. The jury interrupted its deliberations to ask if the only choice it had was either a finding of guilty or not guilty. The court replied that because the jury had to follow the law as found by the court, it could only return a verdict of guilty or not guilty. The Supreme Court affirmed the trial court's instructions, including the statement that the jury must accept the law as received from the court.

The majority reviewed numerous English, federal and state decisions to support its position that a jury must apply the law as given by the court. The majority also reviewed certain cases
that appear to hold that juries have the right and/or the power to disregard the law as postulated by the courts. The Supreme Court reviewed the Case of Fries\(^9\) and noted that many proponents of jury nullification cite Justice Chase's statement to support a jury's right to nullify the court's law.\(^2\) In Fries, Justice Chase stated that juries are to decide "both the law and facts, on their consideration of the whole case."\(^9\) The Supreme Court found this as unpersuasive and noted that later that same year, Justice Chase rejected an attorney's suggestion that a jury could review the constitutionality of an Act of Congress.\(^4\) The Court further noted that Justice Chase, in rejecting counsel's suggestion, realized that the power of the court is separate from the power of the jury.\(^5\)

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91. 9 F. Cas. 924 (C.C. Pa. 1800) (No. 5,127). John Fries was tried for treason for "levying war against the United States, contrary to the constitution." Fries, 9 F. Cas. at 930.

92. Sparf & Hansen, 156 U.S. at 69-70.

93. Fries, 9 F. Cas. at 930. In Fries, Justice Chase stated:

It is the duty of the court in this case, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all criminal cases, both the law and the facts, on their consideration of the whole case.

\[\text{Id.}\]

94. Sparf & Hansen, 156 U.S. at 70. See United States v. Callender, 25 F. Cas. 239 (C.C. Vir. 1800) (No. 14,709). In Callender, the defendant was on trial for libel, and the defendant's attorney attempted to argue that the jury could declare the libel law unconstitutional. Callender, 25 F. Cas. at 252-54. Although Justice Chase stated that "we all know that juries have the right to decide the law, as well as the fact," he disagreed with the concept that the jury could rule on the constitutionality of the law. \[\text{Id.}\] at 256-57. The justice stated that "the judicial power of the United States is the only proper and competent authority to decide whether any statute . . . [is] contrary to . . . the federal constitution." \[\text{Id.}\] The Supreme Court stated that Justice Chase "was appalled at the suggestion by learned counsel that the jury were entitled, of right, to determine the constitutional validity of the act of [C]ongress under which the accused was indicted." Sparf & Hansen, 156 U.S. at 70.

95. Sparf & Hansen, 156 U.S. at 71. Justice Chase stated:

I have uniformly delivered the opinion "that the petit jury have a right to decide the law as well as the fact in criminal cases;" but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States.

\[\text{Id.}\] (citing Callender, 25 F. Cas. at 258).
The Supreme Court also discussed *Kane v. Commonwealth*, an oft-cited case by jury nullification proponents. In *Kane*, the court stated that a jury's power to judge the law is guaranteed in Pennsylvania. The Supreme Court interpreted two subsequent Pennsylvania cases, *Nicholson v. Commonwealth* and *Commonwealth v. McManus*, to clarify *Kane* and support the proposition that a court decides the law.

The Supreme Court summarily dismissed *Bushell*, by merely stating that what *Bushell* settled was that when a jury renders a general verdict, it cannot be determined whether it disregarded the court's instructions or whether jurors proceeded upon their own views of the facts.

### D. Modern Jurisprudence

As discussed above, the application of the doctrine of jury nullification has swung like a pendulum. Before the American Revolution and well into the nineteenth century, jury nullification was widely accepted and used. Late in the nineteenth century, the doctrine of jury nullification fell out of favor and was repudiated by the judiciary. In the 1950's the doctrine was not affirmatively used by defense lawyers, but some white juries outraged many Northerners and civil rights advocates by disregarding the law and acquitting defendants charged with killing African-Americans.

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96. 89 Pa. 522 (1879).
98. *Kane*, 89 Pa. at 527. Chief Justice Sharswood stated that "[t]he power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights." *Id*.
99. 96 Pa. 503, 505 (1879) (holding the court has the right to instruct the jury on the law, and to caution the jury from finding contrary to the courts instructions).
100. 21 A. 1018 (Pa. 1891). In *McManus*, the trial court, in answering a point of charge stating that the jury is the judge of the law, stated, "the statement of the law by the court [is] the best evidence of the law within [your] reach . . . [you are] to be guided by what the court has said with reference to the law." *McManus*, 21 A. at 1018. The Pennsylvania Supreme Court affirmed the trial court's answer and stated that it was consistent with *Kane*. *Id.* at 1019-20. The Pennsylvania Supreme Court stated: "A judge who instructs a jury in a criminal case that they may disregard the law as laid down by the court errs as widely as the judge who gives them a binding instruction upon the law." *Id.* at 1020. In a concurring opinion, Justice Mitchell opined that the jury is not the judge of the law and the answer to the point of charge should have been an "unqualified negative." *Id.* (Mitchell, J., concurring).
102. *Id.* at 90-91.
In United States v. Spock, the First Circuit Court of Appeals bolstered the argument that a jury may disregard the law as posited by a court and that the jury may be the finder of law as well as fact. In Spock, the court ruled that a jury's power is destroyed when special interrogatories are used in a criminal trial. It appears that the court did not want to limit juries' abilities to render general verdicts, and implicit in a general verdict is the fact that in deliberations, a jury may decide to disregard the law and apply what it believes to be the better rule of law. The court did not address the issue of whether an attorney may make the jury aware of this power, just that a jury implicitly has such a power.

In United States v. Dougherty, the court specifically addressed the issue of whether an attorney could have the jury instructed on its power to nullify. The court of appeals, in a two-to-one decision, upheld the trial court's refusal to instruct the jury about the doctrine of jury nullification. The court noted that in the Anglo-American judicial system, juries have the power to ignore evidence and a court's instructions concerning the law. The court cited the acquittal of Peter Zenger and the numerous acquittals under the Fugitive Slave Act as historical examples.

The court noted, however, that the "tide" was turned in Battiste. The court acknowledged that even after Battiste, there was still some proponents of jury nullification, but the court cited Sparf & Hansen and stated that the law was now settled.

II. ARGUMENTS OPPOSING JURY NULLIFICATION

A. Historically No Such Right Existed in England or America

As evidenced by the majority and dissenting opinions in Sparf & Hansen, English and American history can be used to support or refute the doctrine of jury nullification. The rationale of the

volved the slaying of Emmitt Till and civil rights leader Medgar Evers. Id.

104. 416 F.2d 165 (1st Cir. 1969).
105. Spock, 416 F.2d at 182-83.
107. Dougherty, 473 F.2d at 1130-37.
108. Id. at 1130. The court stated: "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judges." Id.
109. Id.
110. Id. at 1133.
111. Id.
majority in Sparf & Hansen, as discussed in Section I, articulates the standard argument used by opponents of jury nullification when arguing that no historic right exists to support jury nullification.

B. Legislatures Make Laws—Not the “Wacko Fringe”

Opponents of the doctrine of jury nullification argue that it is the function of elected legislatures, and not twelve unelected individuals, to make laws. These opponents argue that jury nullification is the “antithesis of democracy” and that juries have no such power. Professor Simson argues that a jury is merely a group of “randomly selected individuals” who answer to no one. Simson maintains that juries which nullify laws passed by an elected body “frustrate the people’s sense of justice.” Other commentators argue that today’s use of jury nullification is not to protect citizens against oppressive governmental policies, but instead to allow juries to adopt a “defendant’s view . . . of morality.” The opponents describe the jury nullification movement as an “effort by grass roots organizations, unsuccessful in having their policies promoted and endorsed by Congress or their state legislatures, to sneak their political agendas in the back door by making the jury the new determinant of public policy.” Former Missouri Senator Thomas F. Eagleton, in commenting on the modern movement of jury nullification, stated: “The movement seeks to institutionalize jury rebellion. Jurors would follow only those laws they liked and ignore the ones they didn’t like . . . [and] is an attempt by the wacko fringe to further its anti-government agenda.”

One commentator, while not conceding that throughout history juries have never had the right to nullify, concludes that the same factors that once legitimized the practice are no longer present. The commentator reasons that in early America, the judiciary was mostly composed of laymen, and therefore, juries were just as qualified to determine the law as were judges.

113. Id. at 1124.
114. Simson, supra note 10, at 512.
115. Id. Professor Simson reasons that because Congress is elected, a law passed by Congress evidences the majority’s view. Id.
116. Creagan, supra note 7, at 1113. See Scott, supra note 8, at 420.
117. Creagan, supra note 7, at 1113 (citing Scott, supra note 8, at 419-23).
118. Lindecke, supra note 5, at 5B.
119. Scott, supra note 8, at 419.
120. Id. at 417.
Related to this is the argument that allowing jury nullification leads to inconsistency in the application of laws.\textsuperscript{121} This argument reasons that if jury nullification is allowed, laws will not be uniformly applied, but rather application will depend on the particular jury.\textsuperscript{122}

C. Jury Nullification Frustrates a Central Government's Ability to Implement Nationwide Policies

Opponents argue that when a jury nullifies a law and acts as the "conscience of the community," it is not speaking for the nation's conscience, but just a narrow community's conscience.\textsuperscript{123} Professor Simson states that local biases may "immunize criminal acts visited upon members of society's 'discrete and insular minorities' [and] is not one that [he] at least can take lightly."\textsuperscript{124}

Other arguments against the right of jury nullification include the argument that the use of jury nullification inhibits legal reform.\textsuperscript{125} Curiously, the argument reasons that by jury nullification "eliminating some of the injustices that would result from the enforcement of an unpopular [oppressive] law," the community will not demand legislative reform and oppressive laws will not be repealed.\textsuperscript{126} And finally, the argument is advanced that jury nullification violates the principle of fair warning.\textsuperscript{127} Opponents argue that a jury may disregard the law and find a legally innocent defendant guilty.\textsuperscript{128}

III. REASONS FOR JURY NULLIFICATION

A. Historical Justification

In \textit{Sparf & Hansen}, Justice Gray, joined by Justice Shiras, authored a lengthy dissent.\textsuperscript{129} The dissent took issue with the fact that the question of life or death was not properly decided by

\textsuperscript{121} Creagan, \textit{supra} note 7, at 1126.
\textsuperscript{122} \textit{Id.} at 1127 n.143. The reply to this argument is that inconsistent application of oppressive laws is better than the consistent application. \textit{Id.} Moreover, this critique of the doctrine of jury nullification presumes that laws are strictly enforced in the absence of jury nullification. \textit{Id.}
\textsuperscript{123} Simson, \textit{supra} note 10, at 514.
\textsuperscript{124} \textit{Id.} (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (Stone, J.)).
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 515.
\textsuperscript{127} \textit{Id.} at 515-16.
\textsuperscript{128} Simson, \textit{supra} note 10, at 516.
\textsuperscript{129} \textit{Sparf & Hansen}, 156 U.S. at 110 (Gray, J., dissenting).
the jury as required by the Constitution.\textsuperscript{130} The dissent reviewed English authorities, Colonial and state jurisprudence, and federal cases and concluded that a jury in a criminal case has the right to determine the law.\textsuperscript{131} Justice Gray started his analysis with the Magna Carta and noted that defendants were given a right to a jury, and while juries had the right to "refer a pure question of law to the court," they were not required to do so.\textsuperscript{132} The dissent then discussed British jurisprudence and concluded that although there were periods of exceptions, juries had the power and the right to disregard the law.\textsuperscript{133} The dissent then reviewed early cases which were decided just after the independence of the United States. Justice Gray first discussed \textit{Rex v. Shipley},\textsuperscript{134} and noted two important occurrences during that trial. First, the defendant's attorney, while arguing for a new trial, argued that "the jury, upon the general issue, had not only the power but the right, to decide the law."\textsuperscript{135} During this hearing, the leading counsel for the Crown agreed with the defense counsel's statement.\textsuperscript{136} Although Lord Mansfield objected to the terminology, he accepted the principle.\textsuperscript{137} The second occurrence

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 114. The dissent stated:
It is our deep and settled conviction, confirmed by a reexamination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.

\textit{Id.}

\textsuperscript{132} \textit{Id.} at 114-15.

\textsuperscript{133} \textit{Id.} at 115-16. The dissent noted that during the reign of Charles II, some judges attempted to punish juries for not following the law as instructed by the court. \textit{Id.} at 117. However, Justice Gray noted that when appealed, the lower courts were reversed. \textit{Id.} In reviewing British jurisprudence, the dissent also discussed \textit{Bushell}. \textit{Id.} at 119. Finally, the dissent discussed the \textit{Trial of the Seven Bishops}, in which the defendants were charged with seditious libel. \textit{Id.} at 124. Four judges of the King's Bench instructed the jury. \textit{Id.} at 124-25. Lord Chief Justice Wright stated that the only fact question was whether publication occurred because whether the statements are libel is a question of law and he stated that it was libel. \textit{Id.} Mr. Justice Allybone agreed with the Lord Chief. \textit{Id.} at 125. However, Justices Holloway and Powell told the jury that they did not believe it was a libel, and said it was left to the jury. \textit{Id.} Therefore, Justice Gray concluded that the judges concurred in allowing the jury to settle the question of law. \textit{Id.} at 125-26.

\textsuperscript{134} 21 \textit{Howell's St. Tr.} 847 (1783).

\textsuperscript{135} \textit{Sparf \& Hansen}, 156 U.S. at 133 (Gray, J., dissenting).

\textsuperscript{136} \textit{Id.} The Crown's counsel stated: "(H)eg agreed . . . that it is the right of the jury . . . to take upon themselves the decision of every question of law necessary to the acquittal of the defendant." \textit{Id.}

\textsuperscript{137} \textit{Id.} Justice Gray stated:
Lord Mansfield observing that he should call it the power, not the right, he adhered to the latter expression; and added, that he thought it an important
Justice Gray discussed was Justice Willes' dissent in *Shipley*. Justice Willes noted the Crown's concurrence with the defense lawyer's statement and stated that he believed that the content of the statement was the law of the land.\(^{138}\)

The dissent's opinion has been echoed by recent commentators. One commentator noted that in America, most jurisdictions at one time held that juries had the right to nullify laws.\(^{139}\)

**B. If a Jury has the Power—It has the Right**

As discussed earlier, a jury that renders a general verdict implicitly has the power to nullify the law because the jury does not articulate its reasons for its verdict. Several commentators argued in favor of Texas legislation that would have required a court to inform the jury of its right to disregard the court's instruction.\(^{140}\) The proponents of the legislation argued that because the jury already had the power, the legislation would merely instruct the jury on their power and "stop deceiving them."\(^{141}\)

As a historical review shows, almost all jurists agree that when a jury renders a general verdict in a criminal trial, it has the power to disregard the law. The main reason for this power is the underlying belief that the process of jury deliberation is sacred and should not be interfered with. Therefore, when a jury renders a verdict of not guilty, the community does not know whether the jury did not believe certain witnesses, had a reason-
able doubt, or disregarded the law.

Jurists disagree about whether a defendant has the right to have the jury instructed about its power to nullify the law. Arguing that there is no right to inform the jury of this power leads to uncertainty and inequities. A jury that in deliberation decides that it disagrees with a law, but believes that it is bound by the law as given by the court, will end up convicting a defendant even though the result is against the jurors’ beliefs. Can this be called justice? Another jury could decide that it will disregard the law, but if asked to explain its verdict, will just mention reasonable doubt. The result should be the same, but because we have kept one jury in ignorance, we have forced different results. The jury that believed it could not disregard the law applied and followed the law but justice was not served.

One commentator argues that while a jury cannot blatantly disregard a court’s instruction, a jury usually has ample discretion, which allows the jury to make the law. According to Professor Friedman, two reasons justify this conclusion. First, many laws and statutes cannot be written to cover every conceivable situation. These laws and statutes are given to juries, and the juries must at times interpret the law to be able to apply it to the particular factual situation with which they are dealing. Second, Professor Friedman argues that we as a community are “willing” to allow juries to determine rules once a legislature has set out a general policy prescription.

C. The Spirit of the Law, Not the Letter

Some commentators argue that justice is promoted by informing juries that they have the right to disregard the law when application of the law would result in an unjust result. These commentators argue that common sense and community standards are important factors applied by juries that ensure that “the spirit of the law and not the letter” produce justice. Early common law was based on general principles, and these general principles were applied to particular facts. With this system, there was flexibility and common sense could be employed.

143. Friedman, supra note 142, at 511.
144. Id.
145. Id.
146. Creagan, supra note 7, at 1114.
147. Id.
CONCLUSION

Jury lawlessness is the great corrective in the administration of law.¹⁴₈

Ideally, a court will instruct the jury on the law, the jury will find the facts, apply the law as given by the court and render a verdict that complies with the law and the jurors' consciences. In such a case, both the "law of the land" will be followed and justice will be done. Whether a jury was disregarding the seditious libel law and acquitting John Zenger or refusing to convict under the Fugitive Slave Acts, juries have disregarded laws and the results are that justice was served.

This comment argues for the limited use of the right of jury nullification. The right of jury nullification has some historical basis, however, more importantly, the "right" should exist because the jury already has the power, and because the spirit of the law is what is important, not the obscure words making up a law. Juries truly are the final safeguard between the government and the people.

Some might think that allowing a jury to disregard the law as given by a court will lead to the downfall of our judicial system and our nation, but where would our nation be without the Penn's and Zenger's of yesterday? Or, more importantly, where would we be without the brave jurors who took on the system to ensure justice was secured.

John T. Reed

¹⁴₈. Dean Roscoe Pound, quoted in Scheflin, supra note 46, at 182 (citing Dean Roscoe Pound, Law in Books and Law in Action, 44 AM. L. REV. 12, 18-19 (1910)).