There is no dispute that American jurors have the right and responsibility of judging the facts in a criminal trial. But what about the law? Should they also be allowed to judge a law or societal practice that they believe to be unjust by returning a not guilty verdict when, perhaps, all of the elements of a crime have been proven?

A typical jury instruction in a criminal case may instruct that the jury may only decide questions of fact, and must take the law as the judge gives it. Jurors are instructed that they can only decide the truth and weight of the facts of the case, and apply the judge’s law to these facts.

When a jury fails to follow this instruction, this act of defiance is called “jury nullification.” Jury nullification is the refusal of jurors to convict a defendant despite their belief in the defendant’s guilt. The jury is thus said to “judge the law,” though more accurately the jury is judging the law’s specific application, not its general validity. This divisive practice, once accepted, has become the unspoken secret of the American jury deliberation room. No longer may juries freely disregard laws that they believe to be unjust.

**Jury Nullification: A Prominent Component of Early American Criminal Law**

What options do jurors have when they disagree with a law, but recognize that the legal elements have been met? At the birth of the United States, the Founding Fathers asked themselves this very question, and although “jury nullification” had not yet been named, the concept easily became an integral part of the American criminal justice system.

When the Founding Fathers convened at the Constitutional Convention of 1774, 12 of the states represented had already drafted state constitutions. Of the various provisions included in these constitutions, the only one that had been included in all was the right of a criminal defendant to a trial by jury. Given the role that juries had played in resisting English authority, this was hardly surprising at the time.

During the pre-Revolutionary period, it was not uncommon for juries to act as the voice of the people, using their implied authority of nullification to free defendants who opposed involvement of the British and convicting those who sympathized with it. In fact, it might be persuasively argued that jury nullification was the raison d’être of the constitutional right to trial by jury.

The unrest of the people in those pre-Revolutionary times was clearly evidenced by a series of trials involving seditious libel. In the most famous of those trials, none other than Andrew Hamilton represented accused printer John Peter Zenger. Zenger was the printer of the New York Weekly Journal, a politically charged publication. In one edition, Zenger criticized the governor for arbitrarily revoking defendants’ right to trial by jury. During
Zenger’s trial, Hamilton had this to say to the judge, who insisted that the jury may only determine the issues of fact:

I know … the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. … [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless.20

The enduring conviction of the people to retain trial by jury was again made clear in 1776 when the Declaration of Independence listed a grievance against King George III for “depriving us … of the benefits of trial by jury.”21 Fifteen years later, with the ratification of the Sixth Amendment to the U.S. Constitution, “the right to a speedy and public trial, by an impartial jury”22 finally and irrevocably became available to those accused in a criminal prosecution.

This right to trial by jury was held so dear that of all the rights the Constitution guarantees to the people, it is the only one that appears in both the original Constitution and the Bill of Rights.13 Additionally, three of the amendments in the Bill of Rights make mention of trial by jury.14 Yale Constitutional Law professor Akhil Reed Amar has accurately noted that “juries were at the heart of the Bill of Rights.”15

It is clear that jury nullification was an important component of early American litigation.16 The importance of this right was certainly recognized by the Founders7 and, for a time, echoed vigorously by the Supreme Court.18

Proponents of the concept have struggled to understand what made it such an integral part of early American law, only to become a pariah of modern litigation. Some believe that it was simply a matter of necessity — lawyers and even law books were in short supply. Later, however, it seems that that this power of the jury became a symbol of trust in the public’s sense of justice.19

Early in its history, the U.S. Supreme Court heard a very small number of jury trials. One of them, in 1794, was Georgia v. Brailsford.20 In Brailsford, jurors were told that they were presumed to be the best judges of fact while judges were presumed to be the best judges of the law.21 However, they were also told that “it must be observed, that by the same law, which rec-

Jury Nullification Through the Ages

Andrew J. Parmenter interestingly explains the history of jury nullification in the United States by describing various centuries of fluctuation.23 Parmenter’s description is based on a review of the case law during each period. Thus, the period of 1789–1895 is called “The Century of the Jury.”24 Parmenter explains that “if there was any doubt about the jury’s right to judge the law after the adoption of the Sixth Amendment, this doubt was quickly laid to rest in the Supreme Court decision of Georgia v. Brailsford, where Chief Justice John Jay instructed that juries have the right to determine the law as well as the fact in controversy.”25

The decision in the 1895 case, Sparf & Hansen v. United States,26 brought with it an end to “The Century of the Jury,” and ushered in “The Century of the Judge” (1886–1990).27 In Sparf, Justice Harlan ended almost a hundred years of relatively free exercise or jury nullification by holding that the court’s determination of the law and the jury’s determination of the facts “cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.”28

After the decision written by Justice Harlan in Sparf, the use of jury nullification decreased drastically.29 Courts seemed eager to end what many considered an “archaic, outmoded, and atrocious” practice.30 But perhaps a more careful interpretation of Sparf was in order. The holding of the Court did not preclude judges from giving nullification orders in all circumstances; it only stated that it was not reversible error for an attorney to instruct the jury that it would be wrong to disregard the court’s instruction of law.31 Parmenter goes on to describe the 1990s as “A Decade of Debate,” citing nullification verdicts handed out in the Rodney King,32 O.J. Simpson,33 and Jack Kevorkian34 cases. In the Simpson case, the defendant’s attorney, Johnny Cochran, was well aware that the Sparf holding did not expressly prevent jury nullification, and he pleaded with the jury to send a message:

You … 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 … are the ones in war; you are the ones on the front line.25

It would be very difficult to say with certainty whether the jury acquitted O.J. Simpson because the prosecution failed to prove its case, or if it was an example of “symbolic” nullification. The decision of the case was so polarizing that many people remember where they were when they heard the verdict. It might well be argued that the O.J. Simpson verdict was the most well-known example of jury nullification in recent times.

So We Know Juries Nullify, but Why?

In addressing the issue of jury nullification, young lawyer Arie Rubenstein observed that nullification can and does happen for any number of reasons.35 He recognized and classified the most common. “Classical” jury nullification is, perhaps, the type that first comes to mind when a lawyer considers the concept. Classical jury nullification occurs when the jury believes that the law itself, or perhaps the mandated punishment, is not just.36 “As applied” jury nullification is a little bit different. Jurors do not believe that the law itself is unjust, just its application in the case at bar.37 Most people have a sense of how they believe their laws should be applied, and deviation from these preconceptions does not always sit well with juries. The most extreme example of this in the realm of jury nullification is “symbolic” nullification. When this happens, the members of the jury do not necessarily disagree with the law or its application; their decision, instead, is intended

Why has jury nullification fallen out of favor with the courts?
s...
on the issue of whether to instruct jurors of their ability to exercise nullification is often as simple as typing a few words into Lexis or Westlaw. It is more difficult, perhaps, to know if and when it is ethical.

It would be rash for a defense attorney to argue that nullification is appropriate in every case. It is a practice that must be used and considered only in the factual context of a particular case or defendant. Consider, for example, an article written by law professor Paul Butler. In his article entitled Racially Based Jury Nullification: Black Power in the Criminal Justice System, Professor Butler argued that “the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction.” While the article did seem to have the benefit of bringing the issue of nullification to the attention of courts across the country, it was met with a great deal of apprehension. Fearful, perhaps, of its reckless application, courts became eager to establish precedent that nullification would not be tolerated. In United States v. Thomas, the court made clear that “[n]ullification is, by definition, a violation of a juror’s oath to apply the law as instructed by the court.”

Since nullification has been considered a “violation of a juror’s oath,” and it is well known that “neither the court nor counsel should encourage jurors to violate their oath,” practitioners must take care when attempting to utilize jury nullification. A lawyer’s attempt (often in closing argument) must strike a perfect balance between not “mak[ing] arguments calculated to appeal to the prejudices of the jury” and fulfilling the foremost obligation to the client — “act[ing] with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

Because there are very few states that allow affirmative nullification arguments or instructions, informing members of the jury of their ability to nullify must be done with some finesse. When appropriate, it is the zealous advocate’s obligation to inform the jury that improper or even immoral prosecutions do not have to be tolerated. They must be told that the decision of what is improper or immoral can be their decision to make.

In a Senate hearing held in October 2011, Supreme Court Justice Antonin Scalia was asked about his opinion of the jury in checking governmental power. He responded that it would not be inappropriate for jurors to “ignore the law” if the law “is producing terrible results.” The people of the United States, in their role as jurors, have found that on a number of occasions, “terrible results” were indeed being produced. Jury nullification has continued, throughout history, to right society’s perception of wrong. Northern jurors used their authority to nullify when they refused to convict runaway slaves under the fugitive slave laws. Later, jurors were largely responsible for the end of
Notes

2. Id.
4. Id.
6. Id. at 874.
8. Id.
9. Id. at 78 (Chief Justice DeLancey stated that “the jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libellous; you know this is very common; it is the nature of a special verdict, where the jury leave the matter of law to the Court.”).
10. Id.
12. USCA Const. amend. VI-JURY Trials.
13. See U.S. Const. art. III, § 2, cl. 3 (“The trial of all Crimes … shall be by jury”); id. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).
14. U.S. Const. amend. V, VI, VII.
18. See infra, note 20 and accompanying text.
19. See Richard E. Ellis, The Jeffersonian Crisis: Court and Politics in the Young Republic 115 (1971) (citing an early New Hampshire case in which the justice very deferentially instructed the jury that “[a] clear head and an honest heart are [worth] more than all the law of the lawyers”).
21. Id. at 4.
22. Id.
24. Id. at 385.
25. Id.
28. Id. at 107.
29. Many states suddenly struck down the practice of informing juries that they could judge the law as well as the facts. See, e.g., Pierson v. States, 12 Ala. 149 (1847); Pleasant v. State, 13 Ark. 360 (1852); and State v. Buckley, 40 Conn. 246 (1873).
31. Sparf, 156 U.S. at 106.
32. Parmenter, supra note 23, at 393.
33. Id. at 394.
34. Id. at 393.
37. Id.
38. Id.
42. Compare U.S. Const. art. I (describing the role of Congress), id. art. II (describing the role of the president), and id. art. III (describing the role of the judiciary).
43. Id.
46. Id. at 171-73.
50. Dann at 14.
51. Id.
53. Id.
54. Id.
55. Id.
57. Id. at 679.
59. Id.
60. United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983).
61. American Bar Association Standards for Criminal Justice, 4-7.7.

About the Authors

Patrick T. Barone is the principal and founding member of The Barone Defense Firm, headquartered in Birmingham, Mich. He is an adjunct professor at the Thomas M. Cooley Law School, a graduate of the Gerry Spence Trial Lawyer’s College, and the author of two books on DUI defense including the two-volume treatise Defending Drinking Drivers.

Patrick T. Barone
280 N. Old Woodward Avenue Suite 200
Birmingham, MI 48009
248-594-4554
Fax 248-594-4549

Brittani Baldwin
baldwinb@cooley.edu

Brittani Baldwin graduated from the Thomas M. Cooley School of Law with Honors in January 2013. She is currently studying to take the Bar Exam in Virginia, where she hopes to practice indigent criminal defense.

Brittani Baldwin
baldwinb@cooley.edu