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## JURY NULLIFICATION IN THE AMERICAN LEGAL SYSTEM. BASICS OF THE DOCTRINE FROM THE PERSPECTIVE OF A NON-COMMON LAW LAWYER

### Introduction

The American jury system for a non-common law lawyer constitutes a fascinating field for legal observation. From the first moment of its review, it is clear there is no one American jury system but rather several American jury systems since every one of the fifty states, the federal government, and the District of Columbia have separate laws, procedures, courts, customs and practices<sup>1</sup>. In addition there are separate rules for jury trials in criminal and civil jurisdictions.

The right to a trial by jury is guaranteed by the Constitution of the United States through the clause: '[t]he Trial of all Crimes, except in the Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed'<sup>2</sup>. Due to the importance that the Founding Fathers believed a trial by jury had in the legal system, this single general provision in the Constitution did not constitute a sufficient assurance for those who feared federal tyranny<sup>3</sup>. This is why additional provisions were incorporated into the Bill of Rights. Consequently, the Sixth Amendment to the Constitution provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy trial,

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<sup>1</sup> R. N. Jonakait, *The American Jury System*, New Haven and London 2003, p. 1.

<sup>2</sup> U. S. Constitution, Article III, §2, cl. 3.

<sup>3</sup> N. J. King, *The American Criminal Jury*, [in:] N. Vidmar (ed.), *World Jury Systems*, Oxford 2000, p. 94.

by an impartial jury of the State and district wherein the crime shall have been committed<sup>4</sup>. Additionally, for civil matters, the Seventh Amendment provides that 'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be re-examined in any Court of the United States, than according to the rules of common law'<sup>5</sup>. Through the years of execution and implementation of the Constitution, certain problematic issues have risen. First of all, the constitutional provisions for jury trials referred only to cases in the federal system and since the majority of the criminal cases were taking place in states courts, there was a need for clarification. In the 1968 landmark case *Duncan v. Louisiana* the Supreme Court of the United States finally resolved this issue while reviewing the right to a jury trial in a criminal proceeding before a state court by incorporating the Sixth Amendment through the Due Process Clause of the Fourteenth Amendment and confirmed that since "trial by jury in criminal cases is fundamental to the American scheme of justice", it has to apply to state criminal proceedings as well<sup>6</sup>. Another controversial issue raised the question whether a defendant has the right to a jury trial in every case. Although the language of the Sixth Amendment provides that a criminal defendant has right to a jury trial in "all criminal prosecutions", the Supreme Court in the case *Blanton v. City of North Las Vegas* has interpreted this provision to mean that the right to a jury trial applied only in serious or nonpetty crimes<sup>7</sup> and more specifically confirmed in *United States v. Nachtigal* that, in cases where the defendant is charged with a crime that carries a maximum prison term of less than six months, there is no right to a jury trial<sup>8</sup>. In 1975 in the case of *Taylor v. Louisiana* the Supreme Court interpreted the requirement of an "impartial jury" to mean a jury in which jurors are drawn from "a fair cross section" of a community<sup>9</sup>. Although, the Supreme Court has been actively involved in the process of shaping the scope of the right to jury trials, Congress provided the legislature's point of view as well. The United States Code provides uniform procedures for implementing the right to a jury trial in federal court that apply in both

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<sup>4</sup> U. S. Constitution, amendment VI.

<sup>5</sup> U. S. Constitution, amendment VII.

<sup>6</sup> *Duncan v. Louisiana*, 391 U. S. (1968), p. 145, 149.

<sup>7</sup> *Blanton v. City of North Las Vegas*, 489 U. S. (1989), p. 538.

<sup>8</sup> *United States v. Nachtigal*, 507 U. S. (1993) (per curiam), p. 1.

<sup>9</sup> *Taylor v. Louisiana* 419 U.S. (1975), p. 522.

civil and criminal cases<sup>10</sup>. The Statute provides basic threshold requirements for summoning and selecting jurors: '[n]o citizen shall be excluded from service...on account of race, color, religion, sex, national origin, or economic status'<sup>11</sup>; 'any citizen is qualified to serve unless he or she: is not a citizen at least eighteen years old who has lived in the judicial district for at least one year; is unable to read, write, understand or speak English; is unable to serve because of a mental or physical incapacity; or has a charge pending for a crime or has been convicted of a crime punishable by more than one year of imprisonment<sup>12</sup>. It also established uniform protections for jurors: jurors receive the same pay, whether they serve in a civil or criminal trial<sup>13</sup>, they receive protection against dismissal from their jobs as a result of their jury duty<sup>14</sup> and compensation for disability incurred during jury service<sup>15</sup>. Congress has established also specific rules for the proceedings in a jury trial. The Federal Rule of Criminal Procedure provides that the defendant in a criminal case has a right to a jury trial unless he waives it in writing with the consent of the government and the approval of the court<sup>16</sup>. According to the Federal Rule of Civil Procedure, in a civil case, if a party is entitled to a jury trial, they must make a demand for it<sup>17</sup>.

All of the above aspects of multiple legal systems, the interpretation of the Supreme Court or courts in general, different approaches towards civil and criminal cases make the analysis of one single doctrine like jury nullification in the American legal system not only intriguing but also very complicated. Therefore the purpose of this paper is not to present every aspect of jury nullification but rather to point out the most interesting stages of this doctrine's evolution from the perspective of a lawyer that is not grounded in that particular system. Due to some constraints, the paper will refer only to the jury system in criminal cases.

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<sup>10</sup> 28 U.S.C. § 1861 et seq.

<sup>11</sup> 28 U.S.C. § 1862.

<sup>12</sup> 28 U.S.C § 1865(b).

<sup>13</sup> 28 U.S.C. § 1871.

<sup>14</sup> 28 U.S.C. § 1875.

<sup>15</sup> 28 U.S.C. § 1877.

<sup>16</sup> Federal Rule of Criminal Procedure 23(a).

<sup>17</sup> Federal Rule of Civil Procedure 38(b).

## 1. What is jury nullification?

The concept of jury nullification seems to be controversial not only from the point of view of a non-common law lawyer. Although, different understandings, opinions and terminology used by judges, practitioners, scholars and academics tend to surface already at the process of establishing terminology of this institution, the method of describing it is widely agreed upon.

Jury nullification occurs when the jury chooses not to follow the law as it has been explained by the judge to the jury<sup>18</sup>. It happens when the jury acquits a defendant even in a situation where the jury would declare guilt if following the court's legal instruction. In this way juries "nullify" the law insofar as they depart from the law in rendering a verdict<sup>19</sup>. It is also described as the power of the jury to disregard the law and to acquit a defendant accused of a crime, even when the proof at trial demonstrates guilt beyond a reasonable doubt<sup>20</sup>. "Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience"<sup>21</sup>. "Nullification occurs when the defendant's guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit."<sup>22</sup> "Nullification occurs whenever a jury intentionally ignores the trial judge's instructions on the applicable law."<sup>23</sup>, "when a jury--based on its own sense of justice or fairness--refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt."<sup>24</sup> In various sources the power of the jury to nullify the law is referred to as "jury mer-

<sup>18</sup> N. M. Mader, *The Jury Process*, New York 2005, p. 179., see also: N. M. Mader, *The Myth of the Nullifying Jury*, "Northwestern University Law Review" 1999, no. 93, p. 877; D.K. Brown, *Jury Nullification Within the Rule of Law*, "Minnesota Law Review" 1997, no. 81, p.1149-1150;

<sup>19</sup> T. Brooks, *A Defence of Jury Nullification*, „Res Publica" 2004, no. 10, p. 401.

<sup>20</sup> N. J. King, *The American Criminal Jury...*, p. 104.

<sup>21</sup> P. Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, "Yale Law Journal" 1995, no.105, p. 677, 700.

<sup>22</sup> A. D. Leipold, *Rethinking Jury Nullification*, "Virginia Law Review" 1996, no. 82, p. 253.

<sup>23</sup> L. Noah, *Civil Jury Nullification*, 86 "Iowa Law Review" 2001, no. 86, p. 1601, 1604.

<sup>24</sup> J. B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, "American Criminal Law Review" 1993, no. 30, p. 239.

cy", "jury lawlessness", "jury justice", "jury equity", jury veto power"<sup>25</sup>. Proponents of this doctrine suggest different terminology and refer to it as "jury independence" since, as Clay S. Conrad in his thorough publication on jury nullification, states: "the jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust. If jurors believe enforcing the law in a specific case would cause an injustice, it is their prerogative to acquit. If they believe a law is unjust, or misapplied, or that it never was, or never should have been, intended to cover a case such as the one they are facing, it is their duty to see justice done."<sup>26</sup>.

Taking into consideration these definitions, it is important to emphasize two aspects that nullification does not include. Firstly, jurors do not have the power to interpret and eventually decide all questions of law since it is the judge who has the power and the right to instruct the jury on the law. Secondly, jury nullification does not include the authority to declare statutes unconstitutional<sup>27</sup>. The main problematic issue of jury nullification is the division of proper roles of the jury and the judge in the criminal system. Chief Justice John Jay explained it in *Georgia v. Brailsford*: „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 the 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 facts; it is, on the other hand, presumable, that the [courts] are the best judges of law. But still both objects are lawfully, within your power of decision"<sup>28</sup>. Therefore, the question whether jury nullification is a valid doctrine in the American jury system is basically the question whether the jury is allowed not only to decide the

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<sup>25</sup> C. S. Conrad, *Jury Nullification. The Evolution of a Doctrine*, Washington D.C. 2014, p. 6.

<sup>26</sup> *Ibidem*, p. 7.

<sup>27</sup> A. Schefflin, J. Van Dyke, *Jury Nullification: The Contours of a Controversy*, „Law & Contemporary Problems“ 1980, no 43, p. 51-54.

<sup>28</sup> *Georgia v. Brailsford*, 3 U.S. (1794), p. 1-4.

facts of the case but also to interpret the law in the given case. And this controversy has been reflected in the history of the doctrine.

## 2. Origins of the doctrine

The origins of the of jury nullification are unknown. However, it is safe to say it has to have certain connotations to the origins of the trial by jury within the ancient English common law<sup>29</sup>. Although, it can be stated that the English jury system has roots that can be traced back 800 years or more, the original concept of the jury was probably introduced in England after the Norman Conquest in 1066<sup>30</sup>. Additionally, the early jurors' role was to provide information on local affairs since there was a practice of putting a group of a local individuals under oath to tell the truth. From its beginnings, the jury system was based on the principle that 'the jurors' decide upon facts. Later on, the role of the jurors shifted to the role of adjudicators in both civil and criminal disputes. One of the landmark dates in the history of jury trials is 1215 and more specifically the Magna Carta, the act that intended to limit the absolute powers of the king through the incorporation of important provisions guaranteeing trial by jury and terminating the power of king to impose arbitrary punishment<sup>31</sup>. Under the new rule, no action could be taken against the defendant without the prior consent of a jury of his peers. What is more, according to one of the classics experts on the jury system, Lysander Spooner, followed by Clay S. Conrad, article 39 of the Magna Carta gave jurors the power to veto the law of the land. Considering this interpretation, "a jury verdict of guilty that is not in accordance with the law of the land may not lead to a judgment against the accused"<sup>32</sup>. The practical implications of this provision did not have proper significance immediately since the jurors were discouraged from delivering an independent verdict by severe medieval penalties. Juries often faced unfortunate summoning before the Star Chamber

<sup>29</sup> C. S. Conrad, *Jury Nullification...*, p. 13.

<sup>30</sup> S. Lloyd-Bostock, C. Thomas, *Juries and Reform in England and Wales*, [in:] N. Vidmar (ed.), *World Jury Systems*, Oxford 2000, p. 54.

<sup>31</sup> Article 39 of Magna Carta, reprinted in *Treasures in Focus*, the British Library, London 2007, p. 19.; see also L Spooner, *An Essay on the Trial by Jury*, Boston 1852, p. 60.

<sup>32</sup> C. S. Conrad, *Jury Nullification...*, p. 19.; L Spooner, *An Essay...*, p. 46-49.

to answer for their verdict. The Star Chamber on the other hand did make use of its contempt powers, especially in libel cases and other cases with political inclinations<sup>33</sup>. One of such examples was the trial of sir Nicholas Throckmorton in 1554. The defendant, a knight who had openly confessed to participation in Wyatt's Rebellion, was acquitted of all charges including high treason for conspiring to kill the queen. In the result, some of the jurors were committed to prison and forced to admit the verdict had been wrong, some were fined harshly and the brother of sir Nicholas Throckmorton, during separate proceedings was found guilty based on the same evidence on which his brother was acquitted<sup>34</sup>. Although, it may seem such punishments the jurors had to face, should have worked against jurors' independence, the power of juries to correct oppressive or unjust laws was beginning to be acknowledged by the mid-seventeen century. In 1649 the Leveller John "Free-born John" Lilburn was tried for high treason for publishing and distributing a large number of political tracts declaring the rights of jurors to vote according to conscience<sup>35</sup>. Lilburn after being denied the right to question witnesses and assistance of a counsel, had to ask to consider that "the jury by law are not only judges of fact but of law also"<sup>36</sup>. The jury after a short deliberation, acquitted the defendant of all charges, giving a valid argument for the independence.

Nevertheless, the first clear acceptance of the jury as an independent decision-making body occurred in the 1670 London trial of William Penn and William Mead<sup>37</sup> and more specifically in the *Bushell's Case* brought by Edward Bushell, one of the 12 jurors who acquitted the Quakers William Penn and William Mead of the capital offences of unlawful and tumultuous assembly, disturbance of peace and riot. The Quaker religion was illegal in 1670 in England and according to the 1662 Quaker Act and the 1664 Conventicles Act, it was illegal to attend a religious meeting of five or more people unless the meeting included the teachings and practices of the Anglican Church<sup>38</sup>. Penn and Mead were charged with a crime after Penn preached in Grace Church Street to a group of 300-400 men due

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<sup>33</sup> C. S. Conrad, *Jury Nullification...*, p. 21.

<sup>34</sup> *Ibidem*, p. 22.

<sup>35</sup> *Ibidem*, p. 23.

<sup>36</sup> *The Trial of Lieutenant-Colonel John Lilburn at the Guildhal of London, for High Treason*, How. St. Tr. 4:1269, 1379 (1649).

<sup>37</sup> A. Schefflin, J. Van Dyke, *Jury Nullification...*, p.56.

<sup>38</sup> T. A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*, Princeton 1985, p. 202.

to the fact that their meeting house had been closed.<sup>39</sup> The jurors made several attempts to deliver the verdict but the court refused to accept it and the jury was ordered without drink, food or toilet facilities imprisoned for several days. These punishments, however, did not change the jurors' perception of the guilt and both Mead and Penn were acquitted. As a result of which the jurors were fined and ordered imprisoned until the fine was paid. Although, eight of the jurors paid the fine, Edward Bushell with John Bailey, John Hammond and Charles Milson refused to pay and went to prison only to make out a writ of *Habeas Corpus ad Subhiciendum* decided by the Court of Common Pleas. The significance of the case lies in the nullification of the power of English courts to punish jurors for corrupt or incorrect verdicts which makes a jury's determination of fact and the application of the law final and unreviewable in criminal cases<sup>40</sup>.

### 3. Revolutionary approach in the American Colonies

In the American legal system, while the general concept of the jury system was transplanted using British doctrines, theories and legal mechanisms, the American jury system has evolved in a different direction and remains different to modern times. The same can be said about the concept of jury nullification.

The "birthplace" of American jury nullification took place in the landmark 1735 trial of publisher John Peter Zenger<sup>41</sup>. In 1734 Zenger was charged by the British Crown with the crime of seditious libel for mocking in *the New York Weekly Journal* the unpopular Royal Governor of New York, William Cosby<sup>42</sup>. Zenger was prosecuted for seditious libel because printing such material was against the law, and truth was no defense. Due to the specific language of the law, Zenger's attorney, Andrew Hamilton, had no choice but to leave it to the jury whether the law the defendant was accused of violating was, in fact the law of the land, and in this sense he

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<sup>39</sup> C. S. Conrad, *Jury Nullification...*, p. 25.

<sup>40</sup> A. T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, „Kansas Journal of Law & Public Policy”, Winter 1997, p. 50.

<sup>41</sup> *Ibidem*, p. 51.

<sup>42</sup> *Rex v. Zenger*, How. St. Tr. 17:675 (1735).

invoked the concept of jury nullification<sup>43</sup>. Mr. Hamilton also made it clear to the jury that the jurors “have 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”<sup>44</sup>. The jury returned an acquittal. This case is significant because it vindicated the principal of freedom of the press as fundamental to liberty, and it established for the first time that American juries had the right to decide the law<sup>45</sup>.

The aftermath of the *Zenger* case set an important direction in Pre-Revolutionary America and the concept of independent juries was often used as a mechanism for opposing arbitrary British rule in a peaceful manner. As a result, the Crown moved several categories of cases from common law courts to the maritime courts where the right to trial by jury was not guaranteed at all<sup>46</sup>. This, on the other hand, resulted in adding this grievance into the Declaration of Independence: “For depriving us, in many Cases, of the Benefits of Trial by Jury”<sup>47</sup>. However, the application of the concept of jury nullification in Colonial America happened not only because of political reasons. At that time judges did not receive any thorough training in law and often were performing their judicial duties without any legal education at all<sup>48</sup>. After the Revolutionary War it was clear for the New Nation that the jury system with its jurors’ independence can be treated as one of the most efficient protests against unjust law passed by the Parliament and it was unlikely that, in the moment of structuring their own government, these citizens would give it away<sup>49</sup>. Thus, Article III of the Constitution along with the Sixth Amendment was adopted. One of the Founding Father in his “Works of John Adams” explicitly stated that: “It is not only the [juror’s] right, but his duty...to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court”<sup>50</sup>. The same interpretation was found by Chief Justice John Jay in the above mentioned case from

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<sup>43</sup> N. J. King, *The American Criminal Jury...*, p. 94.

<sup>44</sup> C. S. Conrad, *Jury Nullification...*, p. 35.

<sup>45</sup> A. T. Oliver, *Jury Nullification...*, p. 51.

<sup>46</sup> A. W. Alschuler, A. G. Deiss, *A Brief History of Criminal Jury in the United States*, „University of Chicago Law Review” 1994, no 61, p. 867-875.

<sup>47</sup> Declaration of Independence, reprinted in the Senate Concurrent Resolution 108, 2006, p. 37.

<sup>48</sup> C. S. Conrad, *Jury Nullification...*, p. 35.

<sup>49</sup> *Ibidem*, p. 45.

<sup>50</sup> *Ibidem*, p. 48.

1794 *Georgia v. Brailsford*<sup>51</sup>. The importance of the case lies not only in the evident statement by the Court that the jury had a right to determine the law as well as the fact in controversy<sup>52</sup> but, as Conrad specifies, in the way the Court precisely drew a line between the roles of the judge and the jury. "The Court rightfully acknowledged that both law and facts were within the jury's right to decide, but the jury should presume that the court was a fair and impartial judge of the law"<sup>53</sup>. A similar reflection of the doctrine was provided on the state level in a series of cases: *Coffin v. Coffin*<sup>54</sup>, *Commonwealth v. Worcester*<sup>55</sup>, *Commonwealth v. Knapp*<sup>56</sup>, *State v. Snow*<sup>57</sup> and *Kane v. Commonwealth*<sup>58</sup>.

#### 4. The beginnings of a modern approach

The eighteenth century unified approach toward jury nullification was interrupted by two cases: *United States v. Fries*<sup>59</sup> and *People v. Callender*<sup>60</sup>. These two cases brought the beginnings of a new approach toward jury independence that involved more constraining jury instructions. By the mid-nineteenth century this trend was visible and gaining more proponents among judges who, through limiting the power of the jury, received more control over the legal outcome of the case, and therefore more control over the development of the common law itself<sup>61</sup>. As Conrad specifies, another reason was the smaller perception of a need for jury independence since Americans believed at that point that there were no unjust laws imposed to the U.S. by the evil foreign forces across the ocean. Nonetheless, the concept of jury independence then was part of American culture,

<sup>51</sup> *Georgia v. Brailsford*, 3 U.S. (1794), p. 1.

<sup>52</sup> *Georgia v. Brailsford*, 3 U.S. (1794), p. 3-4.

<sup>53</sup> C. S. Conrad, *Jury Nullification...*, p. 53.

<sup>54</sup> *Coffin v. Coffin* 4 Mass. (1808), p. 1, 25.

<sup>55</sup> *Commonwealth v. Worcester* 3 Pick.(1826), p. 462.

<sup>56</sup> *Commonwealth v. Knapp* 10 Pick. (1830), p. 477, 496.

<sup>57</sup> *State v. Snow* 18 Me. (1841), p. 346.

<sup>58</sup> *Kane v. Commonwealth* 89 Pa. (1879), p. 522, 527.

<sup>59</sup> *United States v. Fries* 3 U. S. (1799), p.515, 9 F.Cas. (D. Pennsylvania 1800), p. 924.

<sup>60</sup> *People v. Callender* 25 F.Cass. (D. Virginia 1800), p. 239.

<sup>61</sup> C. S. Conrad, *Jury Nullification...*, p. 65.

however, by most Americans regarded as a mechanism reserved only to very extraordinary criminal cases<sup>62</sup>.

The next major jury nullification case that supported this direction was a case that took place during the highly emotional era of slavery: the *United States v. Battiste*<sup>63</sup>. The case involved a sailor who allegedly seized a black man in Massachusetts with the intent to sell him into servitude. Concerned that a Northern abolitionist jury would convict Battiste, Supreme Court Justice Joseph Story delivered detailed instructions: "I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court.... Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance of accidental mistake, to interpret it"<sup>64</sup>. As the result, the defendant was acquitted and Congress passed the *Fugitive Slave Law* in 1850 that outlawed helping slaves to escape or interfering in their capture and return. The statute was not popular in the North, and juries kept exonerating the escaped slaves and their white accomplices case after case. As a result, Congress repealed the Act in 1864 due to the fact that it was "obnoxious to a large part of the population and difficult to enforce because juries habitually acquitted in cases of obvious violation"<sup>65</sup>.

The second half of the nineteenth century brought a series of cases that clarified the federal view and made way for the full denial of the right of the jurors to determine the law<sup>66</sup>. *Sparf v. United States*<sup>67</sup> is one of those cases that became another landmark in the doctrine of jury nullification. The case involved two sailors that were charged with murder after throwing a fellow sailor overboard. During the trial, they claimed that what they did constituted the lesser offense of manslaughter and in the course of proceedings they asked the court to instruct the jurors that they were in power to decide upon murder or manslaughter. The judge, however, overruled the motion on the grounds that there was no evidence to support

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<sup>62</sup> *Ibidem*, p. 66.

<sup>63</sup> *United States v. Battiste* 24 F. Cas. (D. Massachusetts 1835), p. 1042.

<sup>64</sup> *United States v. Battiste* 24 F. Cas. (D. Massachusetts 1835), p. 1042.

<sup>65</sup> A. Schefflin, J. Van Dyke, *Jury Nullification...*, p. 60.

<sup>66</sup> *Ibidem*, p. 99.

<sup>67</sup> *Sparf v. United States*, 156 U.S. (1895), p. 51.

a manslaughter verdict. The jurors, after short deliberations, returned to the judge for further instructions involving the matter of manslaughter<sup>68</sup>. The judge stated that “In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated, and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court”<sup>69</sup>. The defendants were convicted and on appeal the Court had a chance to revisit the issue of jury nullification in a criminal case. Considering the threat of possible abuse of the jury power, the Court stated that public and private safety would be in danger if the principle had been established that jurors in criminal cases are allowed to disregard the law as delivered to them by the court, and become a law to themselves<sup>70</sup>. It was decided also that, it is the responsibility of the court to determine the law and the responsibility of the jury to apply the law. The final conclusion the Court delivered was that the juror’s have the “power” to nullify the law, but not the “right” to do so. Consequently, jurors are able to nullify the law in the sense that, if a criminal jury acquits someone, that verdict stands even if reached on wrong arguments because *the Double Jeopardy Clause of the Fifth Amendment* prohibits the prosecution from trying someone more than once for the same crime<sup>71</sup>. The Court made it clear in *Sparf* that neither a court nor the defendant’s attorney may inform the jury of their nullification power<sup>72</sup>. This case is important for two significant reasons: it is still binding law today and the perception of the role of the jury limited to deciding the facts and applying the law as given by the judge, is still valid doctrine today. Thus, if a jury nullifies, it does it on its own volition<sup>73</sup>.

An interesting spin on jury nullification was taken in the first decades of the twentieth century under *the National Prohibition Act* that penalized a social custom deeply rooted and accepted by American culture and targeted the sacred right to be let alone, the right to do what one will with one’s own life so long as one does not harm others<sup>74</sup>. As Conrad states after

<sup>68</sup> A. T. Oliver, *Jury Nullification...*, p. 52.

<sup>69</sup> *Sparf v. United States*, 156 U.S. (1895), p. 62.

<sup>70</sup> *Sparf v. United States*, 156 U.S. (1895), p. 101.

<sup>71</sup> A. T. Oliver, *Jury Nullification...*, p. 52.

<sup>72</sup> T. Barnet, *New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law*, “New York State Bar Journal” 1993, no. 65, p. 40.

<sup>73</sup> A. T. Oliver, *Jury Nullification...*, p. 52.

<sup>74</sup> C. S. Conrad, *Jury Nullification...*, p. 108.

Harry Kalven and Hans Zeisel “the Prohibition era provided the most intense example of jury revolt in recent history”<sup>75</sup> and Prohibition was regarded as a “crime category in which the jury was totally in war with the law” since in some parts of the United States, almost 60 percent of all alcohol-related cases resulted in acquittals<sup>76</sup>. That was the main reason behind the repeal of the Act in 1933.

At the end of the nineteenth century the trend toward jury independence was to limit it and, if states have not done it before *Sparf v. United States*, it was done during the beginnings of the twentieth century in several cases: *Commonwealth v. Bryson*<sup>77</sup>, *Commonwealth v. McManus*<sup>78</sup>, *Thomas v. State*<sup>79</sup>, and *State v. Willis*<sup>80</sup>.

## 5. The Current view on jury nullification

An interesting chapter with the jury nullification issue was introduced with the controversy of the Vietnam War. Two cases brought another view on jury independence: *United States v. Moylan*<sup>81</sup> and *United States v. Dougherty*<sup>82</sup>, both of them expressing society’s protest against the war in Vietnam.

In *Moylan* the defendants were accused of destroying government property, damage of governmental records and interference with the administration of the Selective Service System after they broke in and destroyed a military draft office. During the appeal, the defense argued that the trial judge should have informed the jury about their power to acquit the defendants, even if their guilt was clear and undeniable, or at least the defense should have been allowed to make such an argument<sup>83</sup>. In the appeal verdict, the court admitted that: “if the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified

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<sup>75</sup> *Ibidem*, p. 109.

<sup>76</sup> *Ibidem*, p. 109.

<sup>77</sup> *Commonwealth v. Bryson* 276 Pa. (1923), p. 566,570.

<sup>78</sup> *Commonwealth v. McManus* 143 Pa. (1891), p. 64.

<sup>79</sup> *Thomas v. State* 29 Md.App. (1975), p. 45.

<sup>80</sup> *State v. Willis* 218 N.W. 2d. (1974), p. 921, 924.

<sup>81</sup> *United States v. Moylan* 417 F2d. (4<sup>th</sup>. Cir. 1969), p. 1002.

<sup>82</sup> *United States v. Dougherty* 473 F2d. (D. C. Cir. 1972), p. 1113.

<sup>83</sup> *United States v. Moylan* 417 F2d. (4<sup>th</sup>. Cir. 1969), p. 1004.

the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the court must abide that decision"<sup>84</sup>. However it was clarified that the jury should not be encouraged in their "lawlessness".

*United States v. Dougherty* is the first modern case that deals in detail with jury nullification instructions and methods of instructing the jurors about their power to nullify<sup>85</sup>. The defendants – nine members of the Catholic clergy, the "D.C. Nine" – were accused of breaking into Dow Chemical Company and damaging their offices. The company was targeted in order to protest against its production of napalm that was being used to bomb objects in Vietnam. During the trial the defense asked for a nullification instruction, and the trial judge refused. The Court in its opinion agreed that the jury has power to nullify, as it was established throughout the history of the jury trial, however, juries must not be instructed on the right to nullify the law: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally tenable. Toleration of such conduct would [be] ... inevitably anarchic."<sup>86</sup>.

An interesting view was introduced by Chief Judge Bazelon in his dissenting opinion that praised the system of jury nullification where he stated that there is no reason "to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine."<sup>87</sup>.

The *Dougherty* case is considered one of the landmark cases in jury independence and presents the modern binding view that the jurors should not be informed about their right to nullify laws.

Today the issue of jury nullification is still a valid point for discussion. In the most recent examples jurors – even with the limited right to be informed – still make use of their independence in cases of "harmless viola-

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<sup>84</sup> *United States v. Moylan* 417 F2d. (4<sup>th</sup>. Cir. 1969), p. 1004.

<sup>85</sup> A. Schefflin, J. Van Dyke, *Jury Nullification...*, p. 65.

<sup>86</sup> *United States v. Dougherty* 473 F2d. (D. C. Cir. 1972), p. 1133-34.

<sup>87</sup> *United States v. Dougherty* 473 F2d. (D. C. Cir. 1972), p. 1135.

tors of victimless crime laws, tax laws, regulatory laws, licensing laws, or political protesters. (...) of mercy killers who have assisted a loved one to end his or her suffering, (...) of peaceful gun owners who wish to be equipped and protect themselves, (...) of cancer, AIDS, glaucoma, and muscular sclerosis (MS) patients who grow and smoke marijuana in order to alleviate their suffering, (...) of battered women who after years of abuse stand up to their batterers”<sup>88</sup>. Sometimes the issue will gain unexpected and unclaimed publicity which can be observed in case of the Branch Davidians, survivalist Randy Weaver, right-to-die advocate Dr. Jack Kevoorkian, Hollywood madam Heidi Fleiss or O.J. Simpson.

In 1989, the Fully Informed Jury Association (“FIJA”) was established in order to educate prospective jurors about their right to nullify the law<sup>89</sup>. To this day FIJA has been working on spreading information, producing jurors’ rights pamphlets and distributing them outside court buildings and making unsuccessful attempts to get jurors’ rights amendments passed in several states<sup>90</sup>. Several states like Arizona, Louisiana, Massachusetts, New York, Tennessee, Texas, and Washington did establish “fully informed jury” legislation only to reject them<sup>91</sup>. In terms of application of the doctrine by the courts, even in states with constitutional provisions guaranteeing the right of jury nullification, the judges repeatedly ruled against the doctrine<sup>92</sup>. Nonetheless, the most modern approach indicates that the jurors have the power to nullify the law but no right to be informed about it.

In conclusion, the doctrine of jury nullification strictly connected with the perception of the role of the juror in a criminal trial, has evolved through the centuries. Depending on the approach toward jurors independence, the doctrine has been executed, developed or opposed by the lawyers and judges in the state and federal system, however one remained the same: perception that it is a fundamental part of the American jury system that was created for the benefit of the citizens to safeguard and protect from overzealous or corrupt government. And for a non-common law

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<sup>88</sup> C. S. Conrad, *Jury Nullification...*, p. 143.

<sup>89</sup> [www.fija.org](http://www.fija.org).

<sup>90</sup> M. C. Mulligan, *Jury Nullification: Its History And Practice*, 33-DEC COLAW 71, December, 2004, p. 74.

<sup>91</sup> M. C. Mulligan, *Jury Nullification: Its History And Practice*, 33-DEC COLAW 71, December, 2004, p.76.

<sup>92</sup> *Beavers v. State*, 236 Ind. (1957), p. 549; *Thomas v. State*, 29 Md.App. (1975), p. 45; *Montgomery v. State*, 292 Md. (1981), p. 84; *Kansas v. McClanahan*, 212 Kan. (1973), p. 208.

lawyer fascinated by the right to be judged by a jury of his peers itself, the right of those peers to ignore unjust law while dealing with guilt beyond reasonable doubt is utterly compelling.

**Key words:** jury, juror, trial by jury, jury nullification, jury independence, nullify

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**PODSTAWY INSTYTUCJI JURY NULLIFICATION  
W AMERYKAŃSKIM SYSTEMIE PRAWNYM Z PUNKTU WIDZENIA  
PRAWNIKA SPOZA SYSTEMU COMMON LAW**

**Streszczenie**

Amerykański system prawny dla prawnika spoza systemu *common law* stanowi fascynujące źródło obserwacji, biorąc pod uwagę, że mamy do czynienia nie z jednym porządkiem prawnym, w którym zagwarantowane są procesy z udziałem ławy przysięgłych, a z licznymi stanowymi systemami ław przysięgłych i jednym federalnym systemem dla całej Unii. Wszelkie te kwestie wielości porządków prawnych, interpretacji Sądu Najwyższego i sądów ogólnych, różnych wizji procedury karnej i cywilnej, czynią z tematu unieważniania prawa przez ławy przysięgłych niezwykle intrygującym, ale i skomplikowanym. Dlatego celem niniejszej pracy nie jest przedstawienie każdej teorii *jury nullification* – która zakłada, że w przypadku, gdy zastosowanie danej podstawy prawnej byłoby niesprawiedliwością, sędziowie przysięgli mogą odmówić wydania orzeczenia skazującego – ale raczej zasygnalizowanie etapów tworzenia się doktryny z punktu widzenia prawnika niezwiązanego z system *common law*.

**Słowa kluczowe:** ława przysięgłych, sędziowie przysięgli, unieważnienie prawa, proces z udziałem ławy przysięgłych, *jury nullification*

**JURY NULLIFICATION В АМЕРИКАНСКОЙ ПРАВОВОЙ СИСТЕМЕ.  
ОСНОВЫ ДОКТРИНЫ С ТОЧКИ ЗРЕНИЯ ЮРИСТА НЕ СВЯЗАННОГО  
С СИСТЕМОЙ COMMON LAW**

**Резюме**

Американская правовая система для юриста за пределами системы *common law* является увлекательным источником наблюдения, учитывая, что имеем дело не с одним правовым порядком, в котором гарантируется процессы с участием суда присяжных, а многими государственными системами суда присяжных и одной федеральной системой для всего Союза. Все эти вопросы множественности юридических систем, интерпретации Верховного Суда и общих судов, различных видений уголовной и гражданской процедуры, делают тему аннулирования закона судом присяжных интригующей, но сложной. Таким образом, целью данной работы не является представление каждой теории *jury nullification* – которая предполагает, что если использование права не будет справедливым

суд присяжных может отказать в выдаче приговора - а представление этапов формирования доктрины с точки зрения юриста, не связанного с системой *common law*.

**Ключевые слова:** суд присяжных, присяжные суды, аннулирование закона, процесс с участием суда присяжных, *jury nullification*