COMMENTS ON JURY NULLIFICATION

Judge John W. Bissell†

At the Spring 1997 Symposium, Judge John W. Bissell argued rigorously against jury nullification. According to Judge Bissell, lawyers and judges take oaths to honor and administer the rule of law. To ignore the law and render an ad hoc decision, which occurs with jury nullification, is a gross perversion of the legal system. Judge Bissell argued that jury nullification should not be used as a defense strategy. A jury trial has various participants: judge, advocates, parties, witnesses, and jury. Each participant plays a separate and distinct role. Allowing jury nullification would place the jury in the improper position of the "second defender." The Judge also argued that as it would be clearly improper for prosecutors to suggest nullification to a jury, defense attorneys should not be allowed to do so either.

Citing a well known quote, "Law must be stable and yet it cannot stand still," the judge argued that jury nullification would destabilize the legal system. Furthermore, to advocate jury nullification in the criminal law context and not in the civil law context is inconsistent. Such an approach would confer greater discretion, freedom, and power on jurors in criminal cases than on those hearing civil cases. Such inconsistency has no support either in logic or in the history of our legal system.

Following up on the symposium discussion, and citing a subsequent case on the issue, Judge Bissell offers further support for his position against jury nullification:

I am pleased to draw your attention to a Second Circuit Opinion issued slightly more than two months after the symposium, which emphatically rejects the proposition of jury nullification.[1]

Indeed, the *Thomas* case provides an interesting microcosm for several significant jury issues which were addressed during the symposium. In *Thomas*, during voir dire, an African-American juror (Juror No. 5) survived a *Batson* challenge, albeit based on erroneous reasoning by the trial judge.[2] During the course of trial, conduct attributed to Juror No. 5 led the trial judge to consider excusing him "for just cause" under Federal Rule of Criminal Procedure 23(b)[3]. The judge conducted *in camera*

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1 *See* United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).

2 *Id.* at 609 n.4.

3 *See id.* at 610.

interviews with the jurors, heard arguments of counsel and, because the trial was near conclusion, decided to retain the juror.[4] The difficulties with Juror No. 5, however, did not end. His allegedly disruptive conduct during deliberations led to an additional *in camera* interview of each juror by the trial judge.[5] Although the reports of the jurors were somewhat conflicting, a synopsis of those reports is as follows:

> One juror described [Juror No. 5 as] hollering at fellow jurors, another said he had called his fellow jurors racists, and two jurors told the court that Juror No. 5 had come close to striking a fellow juror.[6]
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> . . . On the one hand, one juror described Juror No. 5 as favoring acquittal because the defendants were his "people," another suggested that it was because Juror No. 5 thought the defendants were good people, two others stated that Juror No. 5 favored acquittal because he thought that the defendants had engaged in the alleged criminal activity out of economic necessity.[7]

After hearing further arguments from counsel, including the government's position that a jury nullification issue had arisen, the trial judge excused Juror No. 5.[8] The most important basis for that decision was summarized by the Court of Appeals as follows:

> Most importantly, however, the [trial] court found that Juror No. 5 was ignoring the evidence in favor of his own, preconceived ideas about the case:
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> > I believe after hearing everything that [Juror No. 5's] motives are immoral, that he believes that these folks have a right to deal drugs because they don't have any money, they are in a disadvantaged situation and probably that's the thing to do. And I don't think he would convict them no matter what the evidence was.
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> The court found that Juror No. 5 was refusing to convict "because of preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible."[9]

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4 *See id.* at 610-11.
5 *See id.* at 611.
6 *Id.*
7 *Id.*
8 *See id.* at 612.
9 *Id.* (Court of Appeals quoting the trial court and drawing conclusions).

The jury later returned a verdict finding several defendants guilty on all counts, others guilty on some counts and not guilty on others, one defendant not guilty on all counts, plus a deadlock on one count as to one of the defendants.[10] Five of the defendants, convicted on some or all counts against them appealed the convictions based on the dismissal of Juror No. 5.[11] In the latter portions of the Opinion, the court explored in depth the propriety and manner of inquiry into the deliberations of the jury in order to determine whether there was just cause to replace the juror at that time. The Second Circuit concluded as follows:

> On this record, we cannot say that it is beyond doubt that Juror No. 5's position during deliberations was the result of his defiant unwillingness to apply the law as opposed to his reservations about the sufficiency of the Government's case against the defendants.[12]

Before reaching that conclusion, however, the court made it very clear that a juror may not judge the law and purposefully disregard the trial judge's instruction in order to reach a decision of his own choosing. Finding support from numerous sources, the Second Circuit held:

> Here, [the judge] identified a different form of bias as the primary ground for dismissing Juror No. 5 — one arising not from an external event or from a relationship between a juror and a party, but rather, from a more general opposition to the application of the criminal narcotics laws to the defendants' conduct. In the court's view, Juror no. 5 believed that the defendants had "a right to deal drugs." Based on what the court described as the juror's "preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible," the court concluded that Juror No. 5 was unlikely to convict the defendants " no matter what the evidence was." Essentially, the judge found that Juror No. 5 intended to engage in a form of "nullification," a practice whereby a juror votes in purposeful disregard of the evidence, defying the court's instructions on the law.
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> We take this occasion to restate some basic principles regarding the character of our jury system. Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court — in the words of the standard oath administered to jurors in the federal

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10 *See id.*

11 *See id.*

12 *Id.* at 624.

> courts, to "render a true verdict *according to the law and the evidence*." We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent. Accordingly, we conclude that a juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict.[13]

The court explored the classic example of John Peter Zenger, as well as *Bushell's Case*[14] in which Mr. Clay S. Conrad, at the symposium, found considerable support for jury nullification. The court, however, made an important distinction:

> [A]s the quotation from the Supreme Court's opinion in *Standefer*[15] indicates, in the language originally employed by Judge Learned Hand, the power of juries to nullify or exercise a power of lenity is just that — a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.[16]

The Second Circuit found additional support for this proposition from a D.C. Circuit opinion[17] issued by a panel which included now Supreme Court Justice Ginsburg. Quoting that court, the Second Circuit stated:

> A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant guilty, and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.[18]

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13 *Id.* at 614 (citing FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 225 (4th ed. 1996) (emphasis supplied), when referring to the standard oath administered to jurors in the federal courts).

14 *See Thomas*, 116 F.3d at 614-15.

15 Standefer v. United States, 447 U.S. 10 (1980).

16 *Thomas*, 116 F.3d at 615.

17 *See* United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983).

18 *Thomas*, 116 F.3d at 615-16 (quoting *Washington*, 705 F.2d at 494). The Second Circuit also noted that "the exercise of [such] de facto power is a violation of a juror's sworn duty to apply the law as interpreted by the court." *Id.* (citing United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970)).

In addition, footnote number nine in *Thomas* cited many relevant cases:

Finally, in delineating the duties of a federal trial judge the Second Circuit held:

> If it is true that the jury's prerogatives of lenity introduces a slack into the enforcement of law, tempering its rigor by the mollifying influences of current ethical conventions as part and parcel of the system of checks and balances embedded in the very structure of the American criminal trial, there is a countervailing duty and authority on the judge to assure that jurors follow the law. Although nullification may sometimes succeed —because, [inter alia], it does not come to the attention of [the] presiding judge before the completion of a jury's work, and jurors are not answerable for nullification after the verdict has been reached — it would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath. This is true regardless of the juror's motivation for "nullification," including race, ethnicity or similar considerations. A federal judge, whose own oath of office required the judge to "faithfully and impartially discharge and perform all the duties incumbent upon [the judge]. . . under the Constitution and laws of the United Stated," may not ignore colorable claims that a juror is acting on the basis of such improper considerations.[19]

What clearly emerges from the *Thomas* opinion is a realization that while juries have a *power* to nullify which, because of the nature of a jury deliberation, may go undetected, it is not a *right* enjoyed either by the jury or by a party to any lawsuit. Such decisions, in the language endorsed by Justice (then Circuit Judge) Ginsburg, "are lawless, a denial of due process and constituting an exercise of erroneously seized power."[20] No jury or juror has the right to purposefully disregard the court's instructions on the law applicable to a case, including the instruc-

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Accordingly, criminal defendants have no right to a jury instruction alerting jurors to this power to act in contravention of their duty. *See* United States v. Edwards, 101 F.3d 17, 19-20 (2d Cir. 1996); *see also* United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993), *cert. denied*, 512 U.S. 1223 (1994); *Dougherty*, 473 F. 2d at 1136-37. As the Court of Appeals for the Sixth Circuit recognized, to instruct on nullification "would . . . undermine[ ] the impartial determination of justice based on law." United States v. Krzyke, 836 F.2d 1013, 1021 (6th Cir.) (finding no error in court's response to jury on nullification that included the admonition to the jury: "You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case."), *cert. denied*, 488 U.S. 832 (1988).

Thomas, 116 F.3d at 616 n.9 (some citations omitted).

19 *Id.* at 616 (citations omitted).

20 *Washington*, 705 F.2d at 494.

tion that the law must be followed. Finally, a trial judge has the duty to prevent such an event by employing the powers available to the judge under the law, including applicable rules of court.

While I certainly endorse the ruling of the Second Circuit (particularly the guidance and support which that decision provides to a trial judge), I realize that this debate is far from ended. Although the Opinion unequivocally condemns *jury* nullification, one must remember that it arose in the context of one *juror's* effort at nullification. Advocates of jury nullification would probably remind us that the recalcitrance of Juror No. 5 could have frustrated the will of the vast majority (the other eleven members) of the jury. Any significant distinction between *jury* and *juror* nullification was not explored at the symposium, but such a distinction would be an interesting topic to address in the future.