1-1-1996

Nullification in the Nineties

Alan Scheflin
Santa Clara University School of Law, ascheflin@scu.edu

ALAN W. SCHEFLIN*

NULLIFICATION IN THE NINETIES

For more than three quarters of this century, the concept of jury nullification played virtually no role in legal scholarship. Juries no doubt engaged in nullification behavior, but commentators did not identify and label such conduct. Beginning with the antiwar and liberation movements in the 1960s, nullification has been the object of increasing legal attention with most scholars arguing in support. Despite three decades of intense legal debate, jury nullification is still woefully misunderstood and, because of this misunderstanding, it has been rejected, especially by judges.

Professor Van Dyke and I have attempted through our writings to at least correct the misunderstandings in the hopes of clarifying the debate. In the article reprinted in part in this issue, we began focusing attention away from the negative idea of "nullification" towards the more positive concept of "merciful juries." This is more than a semantical change -- it captures the essence of the concept and it curtails the confusion in critics' talk about juries "negating," "disobeying," "discarding," "rejecting," "ignoring," or "repudiating" the law. Nullification is none of those things. If a police officer decides not to arrest, or a prosecutor, not to prosecute, or a judge, not to let a case go forward, we do not say that this civil servant has "disregarded" the law. If a jury, exercising its constitutional function as the conscience of the community, believes that a law, given to them by the judge, would unfairly punish a defendant, they have the power and should be instructed that they have the right not to apply that particular law to this particular defendant under these particular facts. The jury has not rewritten or disregarded the law or refused to follow its terms. The historic function of the jury, to fit the facts to the law as given to them by the judge, has not been violated. On the other hand, to force jurors to apply a law in a fact situation that offends their conscience, is to ask them to violate their oath. For judges to refuse to instruct juries about nullification in the small

---

*Professor of Law, Santa Clara University. B.A. 1963, University of Virginia; J.D. 1966, George Washington University; LL.M. 1967, Harvard University.

percentage of cases where nullification would apply is to engage in judicial deception.

Because nullification allows moves in favor of acquittal, prosecutors have naturally resisted it. For a recent example, see the brief, but poorly reasoned, opinion by the California Attorney General rejecting nullification.[1]

Since the article by Professor Van Dyke and me was written, nullification still has failed to persuade judges, though legislators are beginning to recognize its populist value and appeal. Through the media, more potential jurors are learning about nullification. Unfortunately, their concepts of what it is, and what it is not, are so varied that there is a real danger that juries will produce the anarchy judges fear, not because of nullification, but rather because of the continued judicial refusal to give accurate instructions about it.

An even more serious problem exists in the aftermath of the infamous *Simpson* case and other high visibility cases in which juries refused to convict on any, or on the most serious, charges. Rapidly replacing the idea of "merciful" juries is the growing concern about "gullible" juries. Attacks on the vitality of the jury system itself have intensified as a consequence. Juries are instructed to provide the defendant the benefit of the doubt. Now that they are doing it, critics claim that they should have ignored the law and been more bloodthirsty. There is a sad irony in the fact that the more juries exercise their historical role to weigh the evidence, give the defendant the benefit of reasonable doubt, and act as the conscience of the community, the greater the call for them to disregard the law, ignore the facts, and convict.

The jury was fashioned to protect citizens from the overreaching of government. Now public prejudice is reshaping the role of the jury so that it must protect us from our own individual rights. Unless the trend is stopped and nullification reasserted, it will turn juries into vigilante groups. As we close out the nineties, the effort to protect nullification has gotten harder. Now the fight includes protecting the role of the jury as originally conceived. Few fights in the coming years will be more significant.

1. Ops. Atty. Gen. of Cal., Op. 93-1206 (May 24, 1994).