Jury Nullification Fundamentals for Paralegals

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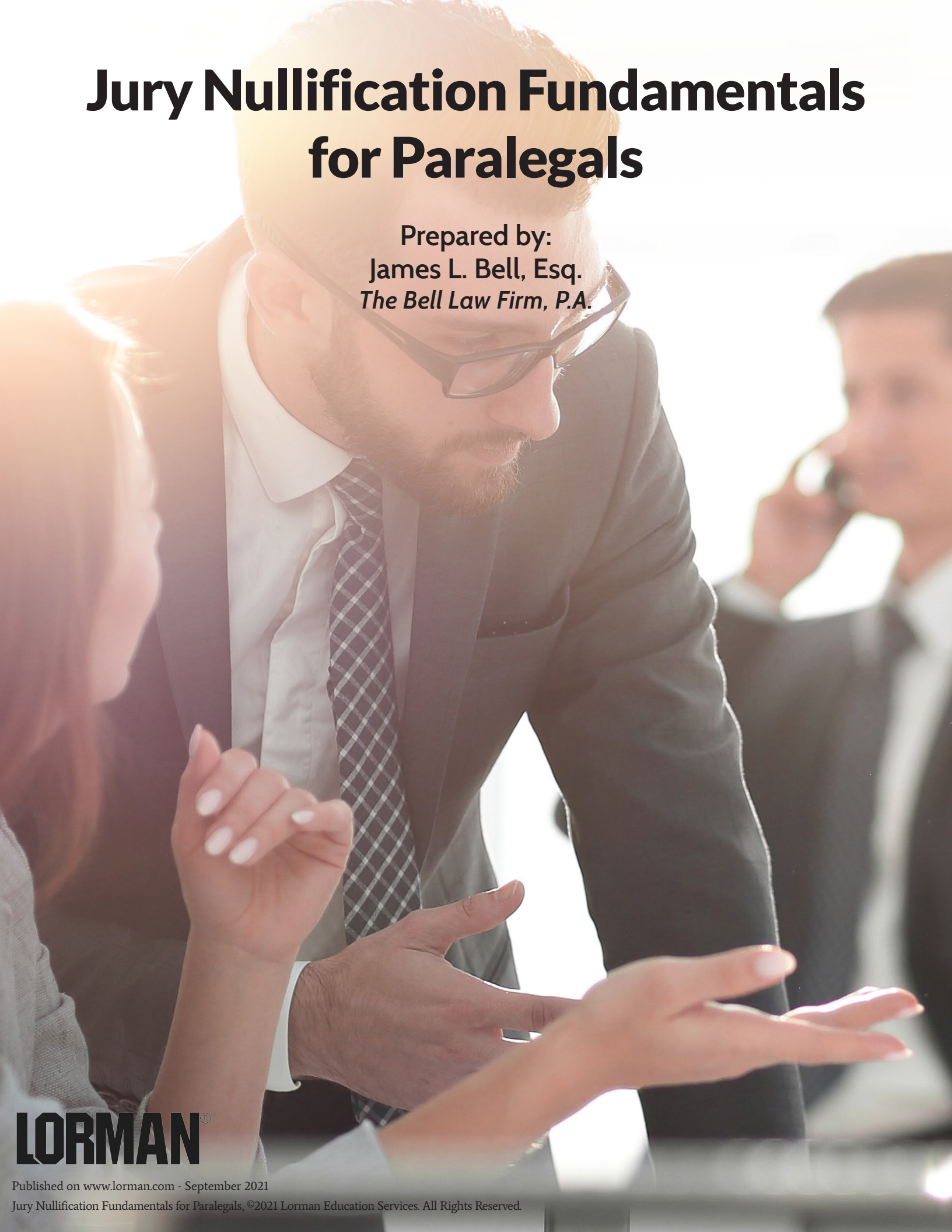

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A. Jury Nullification

1. General Definition:

What can we learn from a jury who goes against the "rule of law" and makes a verdict contrary to facts as presented to them in a trial? Jury equity is also known as jury nullification. It occurs when a jury reaches a decision which is in contradiction to the law. Though it is seldom, a jury sometimes finds a defendant not guilty of a crime or is entitled to an award in a civil trial even though it is clear beyond a shadow of a doubt that he or she has violated a law; or, in a civil matter, the preponderance of evidence is against him. Usually, this happens when the jurors feel that the law itself is unjust or a punishment is unduly harsh. As a result, they hand down a not-guilty verdict. Jury equity can occur in both civil and criminal cases. It is an act of rare, extraordinary courage for a jury. Some may argue that is why our justice system works. Jury nullification (equity) only affects an individual case and has no effect on the law itself. Morever, it cannot be cited as precedent.

2. Concept Began In British Law:

The concept of jury nullification began in the British law of Jury equity. The early history of juries supports the recognition of the de facto power of nullification. By the 12th century, common law

courts in England began using juries for more than administrative duties. Juries were composed primarily of "laymen" from the local community. They provided a somewhat efficient means of dispute resolution with the benefit of supplying legitimacy.

The general power of juries to decide on verdicts was recognized in the English Magna Carta[1] of 1215, which put into words existing practices:

No free man shall be captured, and or imprisoned, or dispensed of his freehold, and or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, or by the law of the land. For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighborhood.

Jury nullification (US)[2] , jury equity(UK)[3], or a perverse verdict[4] generally occurs when members of a criminal trial jury believe that a defendant is guilty, but choose to acquit the defendant anyway, because the jurors consider that the law itself is unjust, that the prosecutor has misapplied the law

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[1]Magna Carta of 1215 Archived September 10, 2014, at the Wayback Machine.

[2] "What is jury equity?". eNotes. Retrieved March 24, 2021.

[3]Bethel G. A. Erastus-Obilo (October 30, 2008). "13: The 'Perverse' Verdict". The Place of the Explained Verdict in the English Criminal Justice System: Decision-making and Criminal Trials. Universal-Publishers. pp. 197–. ISBN 978-1-59942-689-1.

[4]David Hewitt (May 1, 2018). "'Not only a right, but a duty': A history of perverse verdicts". The Justice Gap. Archived from the original on September 9, 2019. Retrieved March 24, 2021.

in the defendant's case, or that the potential punishment for breaking the law is too harsh. Some juries have also refused to convict due to their own prejudices in favor of the defendant.[5] Some juries see the prejudices of our society in racial and sex oriented cases today.

3. No Wrong Decision:

A. Jury nullification is not an official part of criminal procedure, but is the logical consequence of two rules governing the systems in which it exists:

Jurors cannot be punished for reaching a "wrong" decision (such as acquitting a defendant despite their guilt being proven beyond a reasonable doubt). *Supra.*

B. A defendant who is acquitted cannot in many jurisdictions be tried a second time for the same offence. Fifth Amendment, U.S. Constitution[6]

A jury verdict that is contrary to the letter of the law pertains only to the particular case before it. However, if a pattern of acquittals develops in response to repeated attempts to prosecute a particular offence, this can have the de facto effect of invalidating the law. Such a pattern may indicate public opposition to an unwanted legislative enactment. It may also happen that a jury convicts a defendant even if no law was broken, although such a conviction may be overturned on appeal. Nullification can also occur in civil trials.

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[5]Kennedy, Randall. "Racial Conduct by Jurors and Judges: The Problem of the Tainted Conviction", pp. 277-282, and "Black Power in the Jury Box?", pp. 295-310, Race, Crime and the Law (1997).

[6] Radley Balko (August 1, 2005), Justice Often Served By Jury Nullification, Fox News; Clay S. Conrad (1995), Jury Nullification as a Defense Strategy, 2 TEX. F. ON C.L. & C.R. 1, 1-2; Fifth Amendment, U.S. Constitution.

Juries were composed primarily of "laymen" from the local community. They provided a somewhat efficient means of dispute resolution with the benefit of supplying legitimacy.

4. Common Law (Equity)

The general power of juries to decide on verdicts was recognized in the English Magna Carta of 1215, which put into words existing practices:

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This was the early establishment of the "right to trail." That being said, the earliest juries returned verdicts mainly in accordance with the judge or the Crown. This was achieved either by "packing the jury" or by "writ of attaint"[7]. Juries were packed by hand-selecting or by bribing the jury so as to return the desired verdict. This was a common tactic in cases involving treason or sedition. In addition, the writ of attaint allowed a judge to retry the case in front of a second jury when the judge believed the first jury returned a "false verdict". If the second jury returned a different verdict, that

[7]"Blackstone's Commentaries on the Laws of England," Book the Third - Chapter the Twenty-Fifth : Of Proceedings, In the Nature of Appeals, Yale Law School, The Avalon Project, *Documents In Law. History and Diplomacy.*

verdict was imposed and the first jury was imprisoned or fined.

This history is marked by a number of notable exceptions. In 1554, a jury acquitted Sir Nicholas Throckmorton, but was severely punished by the court. Almost a century later in 1649, in the first known attempt to argue for jury nullification, a jury likewise acquitted John Lilburne for his part in inciting a rebellion against the Cromwell regime. The theoretician and politician Eduard Bernstein wrote of Lilburne's trial:

"His contention that the constitution of the Court was contrary to the fundamental laws of the country was unheeded, and his claim that the jury was legally entitled to judge not only as to matters of fact but also as to the application of the law itself, as the Judges represented only 'Norman intruders', whom the jury might here ignore in reaching a verdict, was described by an enraged judge as 'damnable, blasphemous heresy".

This view was not shared by the jury, which, after three days' hearing, acquitted Lilburne—who had defended himself as skillfully as any lawyer could have done—to the great horror of the Judges and the chagrin of the majority of the Council of State. The Judges were so astonished at the verdict of the jury that they had to repeat their question before they would believe their ears, but the public which crowded the judgment hall, on the announcement of the verdict, broke out into cheers so loud and long as, according to the unanimous testimony of contemporary reporters, had never before been heard in the Guildhall. The cheering and waving of caps continued for over half an hour, while the Judges sat, turning white and red in turns, and spread thence to the masses in London and the suburbs. At night bonfires were lighted, and even during the following days the event was the

occasion of joyful demonstrations.[8]

Then again, in 1653, Lilburne was on trial a second time and asked the jury to acquit him if it found the death penalty "unconscionably severe" in proportion to the crime he had committed. The jury found Lilburne "Not guilty of any crime worthy of death".[9]

5. Jury nullification in the America:

In America, jury nullification first appeared just before the American Revolutionary War, when colonial juries frequently exercised their nullification power, principally in maritime cases and cases implicating free speech. Jury nullification became so common that many British prosecutors gave up trying maritime cases since conviction seemed hopeless.[10] In the pre-Civil War era, juries sometimes refused to convict for violations of the Fugitive Slave Act. Later, during Prohibition, juries often nullified alcohol control laws,[39] possibly as often as 60% of the time.[11] This resistance may have contributed to the adoption of the Twenty-first Amendment repealing Prohibition, the Eighteenth Amendment. *See* Generally, U.S. Constitution.

In a well-known example of jury nullification, at the end of Wild Bill Hickok's trial for the

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[8]Eduard Bernstein, Sozialismus und Demokratie in der grossen englischen Revolution (1895); trans. H. J. Stenning (1963, NYC) as Cromwell and Communism: Socialism and Democracy in the Great English Revolution, Library of Congress 63-18392.

[9]Birch, Thomas, ed. (1742). "Slate Papers, 1653: August (5 of 5)". A Collection of the State Papers of John Thurloe, Volume 1, 1638-1653. London: Fletcher Gyles. pp. 435–445. Retrieved December 1, 2016 – via British History Online.

[10]McKnight, Aaron. "Jury Nullification as a Tool to Balance the Demands of Law and Justice". Retrieved December 10, 2014.

[11]Lawrence W. Crispo, et al., Jury Nullification: Law Versus Anarchy, 31 LOY.L.A.L.REV. 1, 3 (1997).

manslaughter of Davis Tutt in 1865, Judge Sempronius Boyd gave the jury two instructions. He first instructed the jury that a conviction was its only option under the law; he then instructed them that they could apply the unwritten law of the "fair fight" and acquit. Hickok was acquitted, a verdict that was not popular with the public.[12]

A. 1800's Fugitive Slave Law

The Civil War or the “War Between The States” and its origin caused a split in this country which many people point to as continuing cultural divine. Jury nullification was practiced in the 1850s to protest the federal Fugitive Slave Act, which was part of the Compromise of 1850. The Act had been passed to mollify the slave owners from the South, who were otherwise threatening to secede from the Union. Across the North, local juries acquitted men accused of violating the law.[13] Many white defendants accused of crimes against blacks and other minorities have often been acquitted by all-white juries, especially in the South, even in the face of irrefutable evidence.[14]

During recent history, many discussions of jury nullification center on drug laws that some consider

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[12]"Legal Culture, Wild Bill Hickok and the Gunslinger Myth" Archived February 13, 2007, at the Wayback Machine University of Texas Tarlton Law Library; O'Connor, Richard (1959). Wild Bill Hickok p. 85.

[13]Passed on September 18, 1850 by Congress, The Fugitive Slave Act of 1850 was part of the Compromise of 1850. The act required that slaves be returned to their owners, even if they were in a free state. The act also made the federal government responsible for finding, returning, and trying escaped slaves.

[14]Conrad, Clay S. (1998). Jury Nullification, The Evolution of a Doctrine, Carolina Academic Press, pp. 167–185. ISBN 0890897026; Clay, Conrad J. "Doing Your Best as a Trial Juror: Surviving Voir Dire" (PDF). Fully Informed Jury Association. Archived from the original (PDF) on October 19, 2017; Fukurai, Hiroshi, and Richard Krooth (2003). Race in the jury box: affirmative action in jury selection. Albany, New York: State University of New York Press. p. 178. OCLC 872139501.

unjust either in principle or because they are seen to discriminate against certain groups. [15] A jury nullification advocacy group estimates that 3–4% of all jury trials involve nullification,[16] and a recent rise in hung juries is seen by some as being indirect evidence that juries have begun to consider the validity or fairness of the laws themselves.[17] It is important to note, in virtually all jurisdictions in the United States, jury instructions allowing nullification are prohibited.

B. Judicial opinions:

As early as1895, *Sparf v. United States* written by Justice John Marshall Harlan, the United States Supreme Court held 5 to 4 that a trial judge has no responsibility to inform the jury of the right to nullify laws. *Sparf v. United States*, 156 U.S. 51 (1895). This decision, often cited, has led to a common practice by United States judges to penalize anyone who attempts to present a nullification argument to jurors and to declare a mistrial if such argument has been presented to them. In some states, jurors are likely to be struck from the panel during voir dire if they will not agree to accept as correct the rulings and instructions of the law as provided by the judge.[18]

In recent rulings, the courts have continued to prohibit informing juries about jury nullification. In a 1969, Fourth Circuit decision, *U.S. v. Moylan*, 417 F.2d 1002 (4th Cir.1969), the Court affirmed

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[15] Id.

[16] Id.

[17] Id.

[18] "... the court can also attempt to prevent such an occurrence of juror nullification by (1) informing prospective jurors at the outset that jurors have no authority to disregard the law and (2) obtaining their assurance that they will not do so if chosen to serve on the jury." People v. Estrada, 141 Cal.App.4th 408 (July 14, 2006. No. C047785).

the concept of jury nullification, but upheld the power of a court to refuse to permit an instruction to the jury to this effect.[19] In 1972, in *United States v. Dougherty*, 473 F.2d 1113, the United States Court of Appeals for the District of Columbia Circuit issued a ruling similar to Moylan that affirmed the de facto power of a jury to nullify the law but upheld the denial of the defense's chance to instruct the jury about the power to nullify.[20]

In 1988, the Sixth Circuit upheld a jury instruction: "There is no such thing as valid jury nullification." In *United States v. Thomas* (1997), the Second Circuit ruled that jurors can be removed if there is evidence that they intend to nullify the law. The Supreme Court has not recently confronted the issue of jury nullification.[21]

In 2017, the Ninth Circuit upheld the first three sentences of the jury's instruction and overruled the second half. The jury instructions were "You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case." However, the Ninth Circuit deemed this instruction a harmless error and affirmed the conviction.[22]

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[19]U.S. vs Moylan, 417 F 2d 1002, 1006 (1969)

[20]Paula L. Hannaford-Agar and Valerie P. Hans (August 26, 2003). "NULLIFICATION AT WORK? A GLIMPSE FROM THE NATIONAL CENTER FOR STATE COURTS STUDY OF HUNG JURIES."

[21]U.S. v Dougherty Archived July 31, 2010, at the Wayback Machine.

[22]"Juries Can Acquit the Guilty, 9th Circuit Says, but 'There Is No Right to Nullification'". Reason.com. June 20, 2017

Conclusion:

There are a few states that allow jury nullification. In 2002, South Dakota voters rejected by a 78% margin a state constitutional amendment to permit criminal defendants to argue for jury nullification. However, on June 18, 2012. New Hampshire passed a law explicitly allowing defense attorneys to inform juries about jury nullification.[23] On October 24, 2014, the New Hampshire Supreme Court effectively nullified the law, holding that the wording of the statute does not allow defense attorneys to tell juries they can "nullify" a law.[24] Further ,the Indiana Constitution allows nullification, but does not require informing the jury of this right: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts".[25]

In light of the recent manner of what federal judges are being appointed and recent political events causing a division of cultures in our country. We are lightly to see a rise of jury nullification cases in the United States.

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[23]Tuccille, J.D. (June 29, 2012), New Hampshire Adopts Jury Nullification Law, Reason Magazine

[24]"New Hampshire Supreme Court Nullifies Jury Nullification Statute". www.fija.org. Fully Informed Jury Association. Archived from the original on October 30, 2017.

[25]Rucker, Robert D. (Spring 1999), The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation, Valparaiso University Law Review