

Yekaterina Bychko

Readings are in this font.

Class Notes are in this font.

Ethics

- I. **Swidler & Berlin v. US**- after death privilege
 - A. petition to get handwritten notes taken by attorney- attorney says no because of attorney-client privilege
 - B. No- client would not have shared that information if he knew that it could be released upon his death.

- II. **Atkins v. Virginia**

- A. mentally retarded cannot be sentenced to death
- B. found out that the prosecution (DA) coached the witness and attorney had to wait for the OK from the bar before he spoke the truth

legal ethics

Atkins v. Virginia- legal realism; (mentally retarded death sentence)

- prosecution coached witness.. DA
- Group work- point is that lawyers have a direct loyalty to their client unless their client is actively placing themselves or somebody else in harm's way. If person is dead already, that's fine. Lawyer always has duty of loyalty to his client, even if the client has died.

Juries- selection/discrimination

Juries

- Most direct way to apply the law
- began with people that knew things about the case, prominent people
- trial by ordeal- determining if a person is guilty by how the person reacts
- an agent of the state; a democratic check on the state
- have a right to trial by jury and a bench trial
- juries decide factual questions- judges make decisions about points of law

jury selection

- pool
 - drawn from registered voters
 - drawn from people with drivers licenses
 - others
- grand jury- jury that issues indictments - 24
 - weeks/months; prosecutor presents evidence and asks jury if there is enough evidence to indict the defendant
- petit jury- finds facts at trial- 12
 - for a specific trial
 - typical jury
 - lawyers shape jury
 - starts with pool of about 40
 - brought into room and do voir dire- each lawyer has the opportunity to question the jurors

- ways to kick out jurors-
 - strikes for cause
 - bias
 - actual reason why juror can't be unbiased participant in the trial
 - always implemented within the contexts of the community
 - peremptory strikes
 - no reason
 - limited
 - number set by jurisdiction

- III. **Batson v. Kentucky**- strike black jurors

- A. prosecutor used peremptory strikes to strike all 4 black people on the prospective jury
- B. case against a black man
- C. judge denied the petition- ruled that you cannot produce a one race jury
- D. appeal took into account Swain v. Alabama which said striking all black jurors goes against equal protection clause
 - Batson hearing - for judge to determine if a lawyer did that
 - only applies to prosecutor

- IV. **J.E.B. v. Alabama**- strike male jurors

- A. male jurors struck because this was a paternity suit- all women jury resulted
- B. ruled that is not okay because of Batson- Batson ruling applies to gender
 - court says that to use peremptory strikes on the basis of gender is not okay; Justice Blackman
 - discrimination is not okay, ever
 - Justice O'Connors concurring opinion- anxious about implications;
 - writes separately to underline that she wants this principle only to be limited to state side. private individuals are not included
 - Scalia is skeptical- writes a dissent: may as well get rid of peremptory strikes
 - ironic that this case has led to gender discrimination because it was an all women trial

Group work- point is that selecting a jury is very difficult- hard to predict who a person really is just from their description- also very easy to go from 40 jurors to 12 once the prosecution and defense strikes everyone

Jury Nullification

- independent democratic check on the power of government
- the jury makes a legal as well as factual determination

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- can happen with any jury
- whenever a jury doesn't convict or convicts on a smaller charge
- it happens when a jury doesn't agree with the crime the prosecution is charging the defendant with- not a crime
- does the jury have a right to know that it can nullify?
- should it be dependent on the situation being really bad?

Jury Nullification prior to the Civil War

- Colonial Era
 - ex. Crown going after newspaper publisher containing mean editorials and jury refused to indict him
- Revolutionary Era- til 1800
 - Alien and Sedition Acts
- The Problem of Fugitive slave trials
 - states and fed government had their own laws
 - court case determines that states cannot go against fed laws- specifically north
 - ex. Anthony Burns; abolitionists on trial were not indicted by jury

Jury Nullification after the Civil War

- Prohibition
 - different regions wanted different things- ex. if NY didn't like prohibition, the fed gov can try the individuals but the local jury would refuse to convict
 - because of the repeated violations and refusals to convict- amendment was struck down; law changed because of jury power
- Jim Crow south
 - black person puts white person on trial but with an all white jury, case is thrown out
- Vietnam War era protests
 - civil disobedience

Abortion protest

- guy who harassed an abortion doctor
- attempt to educate the community about the right of jury nullification and how the guy was acting because of conscious
- didn't work, sent to prison

V. Schefflin, "Jury Nullification"

- A. jurors aren't lawyers and are meant to have conscience
- B. 1735, Hamilton insisted that jurors had a right to do what they will and they acquitted Zenger- the newspaper publisher who allowed articles against the crown to be published anonymously

VI. Schefflin & Van Dyke, "Merciful Juries"

- A. should jurors have a right to know about jury nullification?
- B. awareness about jury nullification is the answer to all the problems- once everybody knows about it, the playing field will be level

VII. Jury Instructions

- A. California- the law forbids you to be governed by mere sentiment..
- B. Maryland- you may accept the law as you apprehend it to be in the case- jurors are judges of the law; judge is only there to assist you

VIII. United States v. Dougherty- vietnam

- A. jury clearly used nullification
- B. "mini legislator"
 - trial and appeal
 - vandalized an office
 - DC office of Dao chemical company
 - 1972.. Napalm producer [Vietnam]
 - Agent Orange- very toxic
 - prosecutor wanted burglary, jury convicted 7/9 of malicious destruction
 - 7 appealed because they claimed the jury didn't know about the option of nullification
 - Circuit judge levanthal says that their conviction stands
 - no law that actually states that the jury has to be informed

Contemporary Jury Nullification

- Visible/notorious trials
- Jack Ke vorkian
 - assisted suicide promoter/ built machine/ used it on people
 - jury refused to convict him
 - now a few states allow physician assisted suicide
- drug offenses
 - ex. marijuana possessions
- Occupy Wall Street
- Fully Informed Jury Association
 - movement to make people informed about this option

Campaign for jury nullification in DC- flyer/MTA ad

- protection for the right to nullify
- protection for the right to know
- New York Context: the Julian Hecklin case
 - handed out pamphlets telling people about jury nullification
 - arrested by Homeland Security
 - judge threw the charges out b/c it wasn't for a specific case

Power/Force/Violence in Law

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IX. Cover, "The Violence of Legal Acts"

- A. law is violence- you are always being violated by the imposition of the law
- B. somebody loses because of a law set in place to protect somebody else

Robert Cover - civil rights activist; *Justice Accused*- antebellum judges that empower slavery

- upheld fugitive slave act because trapped
- relationship between law and power and law and violence
- we don't challenge legal authority because legal words are legal violence

X. D'Errico, "The Law is Terror Put Into Words"

- A. "people that animate the system"
- B. "see through the facade of law"
- C. law is not there for justice, but rather so that those that create it are protected
- D. life controlled by authority

Stanley Millgram

- subjects complied to shocking people with electricity
- people accept what authority has to say and do because of our respect for authority
- death penalty?

Structural Inequality

XI. Galanter, "Why the 'Haves' Come Out Ahead"

- A. one-shotters vs. repeat players
- B. repeat players 'a/ways' win
- C. easier to win as a repeat player because you are used to the system, have money, have time, have relationships built with other members of the system, have the backing of others usually

- one shotter
 - go to court only once
 - lack of resources
 - care a lot about the case
 - don't care about changing the law/rules
 - examples
 - divorce
 - landlord/tenant
 - injured person
 - criminal accused
- repeat players
 - more resources
 - experience
 - lots of litigation
 - connections- judges, attorneys
 - relationships
 - strategic

- care about the rules
- will probably have the outcome of this particular case, affect future cases
- interested in what that case might do for them
- examples-
 - corporations
 - government
 - insurance companies
 - in house council
 - unions
- one shotter vs. one shotter
 - divorce
 - small claims
- one shotter vs. repeat player
 - parents suing school district
 - incentives for each side are different
- repeat player vs. one shotter
 - criminal litigation
 - copyright law
 - contracts
 - IRS v. tax payer
- repeat player vs. repeat player
 - IRS going after corporation
 - governments vs. governments
 - union vs. employer/ employer vs. union
 - copyright
 - contract
 - distributor
 - car accident- insurance company vs. insurance company
- why the have's come out ahead
 - experience
 - resources matter
 - wealth matters
 - in a huge lawsuit, attorneys will pick the plaintiffs- ex. don't ask don't tell and westpoint graduate with honors- clearly not representative of all gay military men, just like the the bad soldier isn't an example either.