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The United States
Law Week
Case Alert & Legal News™

Criminal Law

Juries

Is jury nullification a valid tool for criminal defense lawyers? Orrick attorneys Mark Mermelstein and Mona S. Amer suggest that it is. When done properly, they say that a zealous advocate can use the tactic to benefit a defendant. While there are ethical considerations attached to promoting jury nullification, the authors outline several factors to use to get the point across. Among other things, they suggest selecting jurors that may be aware of the option and presenting evidence that includes the building blocks of nullification.

Jury Nullification: A Tool in the Criminal Defense Lawyer's Toolbox?

MARK MERMELSTEIN AND MONA S. AMER

Jury nullification occurs when a jury either outright acquits or fails to convict a defendant even though the jurors believe the defendant is guilty of the crimes charged, thereby disregarding the evidence they were presented at trial. It has been defined as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Black's Law Dictionary*, 9th ed. 2009.

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History

Jury nullification has resulted in a mixed bag of justice. For example, it has been used to acquit abolitionists who violated the fugitive slave laws by aiding and abetting fleeing slaves. Derek Sheriff, *The Untold History of Nullification: Resisting Slavery*, tenthamendmentcenter.com, Feb. 10, 2010.

But it has also been used in the pre-Civil Rights era to acquit whites accused of committing crimes against blacks and other minorities. Paul Butler, *Jurors Need to Know That They Can Say No*, New York Times, Dec. 20, 2011. It was used in the Prohibition era to acquit those accused of violating Prohibition laws, thus protesting enforcement of the 18th Amendment, and hastening the arrival of the 21st Amendment. *Id.* But it has also been used to nullify prosecutions of police officers accused of brutality. *Id.*

More recently, jury nullification has been used to protest the enforcement of drug possession laws and hefty mandatory sentences. *Push Back Against Drug War*

 ISSN 0148-8139

Profiteering With Jury Nullification, Fully Informed Jury Association, fija.org, Sept. 30, 2013.

Indeed, in December 2010, the Missoula District Court in Montana could not find enough jurors in the available jury pool who would convict someone for having a small amount of marijuana in their house. Jesse McKinley, *Montana Jurors Raise Hopes of Marijuana Advocates*, New York Times, Dec. 23, 2010. As a result, a jury could not be seated. Without a seated jury, one cannot convict a defendant.

And finally, it is possible to see the acquittal of O.J. Simpson, despite overwhelming evidence of guilt in the murders of Nicole Brown Simpson and Ronald Goldman, as an instance of jury nullification. The theory has been offered that the Simpson acquittal was retribution for years of injustice against African Americans in U.S. courts.

However one personally feels about the quality of justice that results from its use, jury nullification has been described as "a cornerstone of American criminal procedure." Duane, J., *Jury Nullification: The Top Secret Constitutional Right*, 22 No. 4 LITIG 6-60 (Summer 1996); Pound, R., *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18 (1910) ("Jury lawlessness is the great corrective of law in its actual administration.").

The jury's power to nullify is a well-established rule of constitutional law, and is built on a foundation of other constitutional rights.

First, the Sixth Amendment right to a jury determination prevents a judge from overturning a jury's verdict, thus ensuring that the jury's word is the final word.

Second, the double jeopardy clause prohibits the government from seeking the remedy of a new trial even in cases where it is clear that an acquittal has resulted from jury nullification. *Id.* As a result, while a hung jury that results from nullification may lead to re-trial, a jury's decision to acquit by nullification will not be second-guessed by the trial judge or by an appellate court. Seemingly then, in the right case, jury nullification would appear to be one of the most effective tools in the criminal defense lawyer's toolbox.

And yet, despite the constitutional protections afforded juries that use nullification as a reason not to convict, that juries have the power to nullify is a fact that is actively concealed from them.

Nuts & Bolts

First, judges—the traditional individuals that inform juries how to discharge their duties—do not inform jurors of this option. As early as 1895, the Supreme Court held 5 to 4 that courts no longer had to inform juries that they possessed the power to veto an unjust law. *Sparf v. United States*, 156 U.S. 51 (1895). The court acknowledged the jury's power to nullify but denied it had a "moral right" to do so, and warned that "if the jury were at liberty to settle the law for themselves, . . . the law itself would be most uncertain." *Id.* at 74.

Indeed, this option is actively concealed from juries. In *People v. Estrada*, 141 Cal. App. 4th 408 (2006), a California trial court gave the jury an instruction during voir dire that was loosely based on "then-section 8.5(b)(19) of the California Standards of Judicial Administration, which stated that a trial court should include the following inquiry during voir dire: 'It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to this case. To put it somewhat differently, whether you approve or disapprove of the court's rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Will all of you follow the law as given to you by me in this case?' " *Id.*

Significantly, the law condones judges' active misrepresentation of the availability of this option , *i.e.*, telling a jury that "[t]here is no such thing as valid jury nullification." *United States v. Krzyske*, 857 F.2d 1089 (6th Cir. 1988).

In *Krzyske*, the defendant, representing himself, mentioned the doctrine of jury nullification in his closing argument. During its deliberations, the jury sent a note to the judge asking the meaning of the term "jury nullification." The court responded, "There is no such thing as valid jury nullification. Your obligation is to follow the instructions of the Court as to the law given to you. You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case."

One of the jurors who heard that instruction later stated in an affidavit that if the judge had properly explained jury nullification in his response to the jury, "a different outcome would have resulted in favor of the defendant . . . because I (for one) would have voted for 'acquittal' on all counts of the indictment." (Merritt, J., dissenting). And yet, this conviction was affirmed.

Should the court become aware during jury deliberations that a juror is contemplating jury nullification, the court may dismiss that juror. *Merced v. McGrath*, 426 F.3d 1076, 1080 (9th Cir. 2005) ("trial judges have the duty to forestall or prevent such conduct").

The law condones judges' active misrepresentation of the availability of jury nullification.

Of course, it is not permissible to discharge a juror based on his views regarding the sufficiency of the evidence, because removal in such a case violates a defendant's Sixth Amendment right to unanimous verdict from an impartial jury. *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999). And so if mid-deliberations, the trial judge were to learn that a juror is contemplating nullification, the judge must determine whether the juror's hesitancy in convicting is borne from a view that the facts were insufficiently proved, or because the juror is determined to not follow the law. This inquiry is made even trickier by the fact that the court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of deliberations. *Id.*

The Ninth Circuit recently affirmed a trial court's dismissal of a juror during jury deliberations due to statements the juror made in the jury room indicating that he did not agree with the laws he was being asked to consider. *United States v. Christensen*, 2015 BL 273274 (9th Cir. Aug. 25, 2015).

Second, despite a sworn duty to zealously advocate for their clients, defense attorneys are similarly prohibited from explicitly arguing for jury nullification. Professional rules of attorney conduct prevent attorneys

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from exhorting jurors to disregard the law, or offering evidence that is only relevant to the justness of an acquittal, or is otherwise designed to induce the jury to nullify. *United States v. Griggs*, 50 F.3d 17 (9th Cir. 1994). Furthermore, attorneys are prohibited from offering any information about the sentence the defendant may face if convicted. *United States v. Johnson*, 62 F.3d 849, 850-51 (6th Cir. 1995). Similar prohibitions apply to asking jurors questions about nullification on voir dire. *Lilly v. Commonwealth*, 50 Va. App. 173, 186 (Ct. App. Va. 2007) ("[D]efendants cannot use *voir dire*, witness testimony, counsel's argument, or jury instructions to comment on legal propositions wholly unrelated to the specific factual issues before the jury.").

Interestingly, although all attorneys face prohibitions regarding jury nullification arguments, prosecutors are free to resort to what may be perceived as the flip-side argument—telling the jury that they are the conscience of the community, and asking them to act accordingly. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), judgment aff'd in part, rev'd in part on other grounds, 518 U.S. 81 (1996) (appeal to jury as conscience of community not impermissible unless specifically designed to inflame the jury); *United States v. Smith*, 918 F.2d 1551 (11th Cir. 1990) (abstract pleas for jury to act as conscience of community permissible when not intended to inflame); *See United States. v. Martinez-Medina*, 279 F.3d 105 (1st Cir. 2002) (improper for prosecutor to state: "[I]f you know in your head and your heart that these defendants are guilty then you must return the only verdict that the evidence commands.").

One might think that prohibiting judges and attorneys from informing juries about a constitutionally protected option would suffice. And yet not so. People attempting to publicize the existence of jury nullification by handing out leaflets on courthouse steps have been arrested and charged with obstruction of justice or jury tampering. *United States v. Grace*, 461 U.S. 171 (1983).

The participants in the legal process charged with informing the jury with how to discharge their duty do not inform them about nullification, but if jurors know about it and apply it, their verdict will not be set aside.

Mercifully, prosecution of those jury nullification proponents does not occur often as "prosecutors have reasoned (correctly) that if they arrest fully informed jury leafleters, the leaflets will have to be given to the leafleter's own jury as evidence." http://www.fija.org/docs/JG_If_You_are_Facing_Charges.pdf.

However, it has recently happened again, in Colorado. The Denver District Attorney recently charged two activists with seven counts each of jury tampering for handing out pamphlets about jury nullification in front of a courthouse. Two other activists in Denver have filed a federal civil rights lawsuit seeking an injunction to prevent police from arresting people handing out flyers. *Denver DA Doubles Down on Jury Nullification Arrests*, fija.org, Aug. 12, 2015; Noelle Phillips, *Denver Activists File Federal Lawsuit Over Jury Nullification Arrests*, The Denver Post, Aug. 17, 2015.

To be sure, we've reached a curious and uncomfortable compromise on this issue: The participants in the legal process charged with informing the jury with how to discharge their duty do not inform them about nullification, but if jurors were to learn about nullification from some other source or already know about it, and invoke it when reaching a verdict, that verdict will not be set aside.

Efforts to address this disconnect have largely failed. For example, in 2012, New Hampshire passed a law explicitly allowing defense attorneys to inform juries about jury nullification. "In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the application of the law in relation to the facts in controversy." N.H. Rev. Stat. Ann. § 519:23-a, entitled "Right of the Accused." A few months later, in a case where a 59-year-old Rastafarian was charged with marijuana cultivation, the judge instructed the jury that "even if you find that the State has proven each and every element of the offense charged beyond a reasonable doubt, you may still find the defendant not guilty if you have a conscientious feeling that a not guilty verdict would be a fair result in this case." The jury acquitted.

By 2014, however, New Hampshire's law had been dismantled by *New Hampshire v. Paul*, 104 A.3d 1058 (N.H. 2014). Paul appealed from a guilty verdict on drug charges, arguing that the court erred "by declining to give the jury nullification instruction that he requested and by giving other jury instructions that effectively contravened his 'jury nullification defense.' "

Both the prosecution and the defense addressed jury nullification in their closing arguments. After closing arguments, however, the trial court instructed the jury, "You *should* follow the law as I explain it regardless of any opinion you may have as to what the law ought to be." The Supreme Court of New Hampshire affirmed Paul's conviction, and interpreted the new law as only codifying pre-existing law rather than creating a new requirement that the judge instruct jurors as to jury nullification. The court held that "the statute merely delineates the jury's traditional function of determining how the law applies to the facts as it has found them . . . ." *Id.* at 1061.

Proponents of jury nullification have also looked to state constitutions for language that would require that juries be informed of their secret powers. Article 23 of the Maryland Constitution states that "[i]n the trial of all criminal cases, the Jury *shall be the Judges of Law*, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." *Id.* (*emphasis added*). Advocates of jury nullification have argued that this language requires juries be told that the judge's instructions on the law are only "advisory." However, Maryland case law has failed to interpret the Maryland Constitution as permitting jury nullification. *See Walker v. State*, 892 A.2d 547 (Ct. App. Md. 2006) (affirming trial court's decision to prohibit counsel from arguing jury nullification in his closing argument).

As a result, it appears that the prohibition on explicitly arguing for jury nullification is here to stay. And yet, as defense lawyers, we know that if a jury were to return a verdict based on nullification, that verdict would stand. Is there a way for a defense lawyer, knowing the

potential effectiveness of this tool, to discharge his or her duty as a zealous advocate for the client without running afoul of any legal or ethical prohibitions? Is there a way for the defense attorney to navigate this minefield and get to the just result?

Nullification as a Defense Lawyer's Tool?

A D.C. Bar ethics opinion answers the question this way: "A lawyer may . . . within the bounds of zealous advocacy, advance arguments that have a good faith evidentiary basis even though those same arguments may also heighten the jury's awareness of its capacity to nullify." D.C. Bar Ethics Opinion 320.

To be sure, an attorney cannot explicitly argue for nullification, but some thought should be given to how the attorney can provide the building blocks for a nullification argument and let the jury assemble the building. A few nullification building blocks to consider:

1. Select a jury that is more likely to be aware of its power to nullify.

While jury selection is more art than science, juries are comprised of human beings. Some thinking ought to be put to what juror profiles are more likely to be aware of their ability to nullify, and to exercise that power in a given case. For example, having an educated jury which includes a lawyer, for example, may increase the likelihood that at least one juror is aware of this ability. Like in *12 Angry Men*, that one juror could very well be your spokesperson in the deliberation room to not only educate the remaining jurors of this power, but be your advocate when you are constrained from explicitly advocating on this issue.

2. Use voir dire to empower the jury.

An empowered jury is one that may be more likely to exercise its power to nullify. While there are clear constraints on using voir dire to ask the jury venire to nullify, depending on the courtroom, there may not be any constraints on empowering the jury. For example, if in deliberations, a juror were to articulate that he was inclined to convict a defendant because of the color of his skin, we would expect other jurors to rise up against that racist juror and tell the racist juror that that type of decision-making is improper and has no place in the deliberation room. In voir dire, getting a commitment from jurors to rise up against an individual who would convict based on improper reasoning may have the effect of empowering jurors. An empowered jury may be more likely to exercise its power to nullify.

An empowered jury is one that may be more likely to nullify.

3. Expand the scope of relevance to include the facts that constitute the nullification building blocks.

Consider carefully the defense theory. Certain defense theories allow for a more expansive view of relevance that will ultimately facilitate introducing nullification-type facts into evidence.

Theories such as self-defense, necessity, justification, entrapment, lack of criminal intent, and selective prosecution all present opportunities for defense counsel to define the scope of relevance so that when eliciting evidence from witnesses to support nullification, that evidence is legally relevant and therefore properly admissible. For example, a defense of entrapment opens the door to the behavior and credibility of the police officers or informants involved.

A defense such as this may be considered a "shadow defense"—on its own, it is unlikely to prevail, but assuming there is at least some evidence in support of it, it may allow the practitioner to get the nullification building blocks into evidence.

4. Offer into evidence the facts that constitute those blocks.

Present to the jury the facts that would support notification. These facts include topics like why the defendant did what he or she did, and the context for the defendant's actions.

The defense's examination of witnesses can elicit facts that would make the jurors understand, and even sympathize with, the defendant's commission of the crime. Counsel may be able to call witnesses who will corroborate those facts through personal knowledge of the defendant. Reputation or character evidence may also be admissible.

Prosecution witnesses also can be cross-examined with the same purpose in mind. Without presenting those facts and providing the jury with the context within which to evaluate the defendant's actions, even if the jury was otherwise aware of its ability to nullify, it would not be inclined to nullify.

Avoid alerting the judge or the prosecution of the defense's intent to raise jury nullification.

5. Don't ask for a ruling that will then prevent you from making the argument you want to make.

Should counsel ask for a jury instruction or motion *in limine* ruling permitting argument regarding jury nullification? Even though it is within the court's discretion to grant a jury nullification instruction, *United States v. Grismore*, 546 F.2d 844, 849 (10th Cir. 1976), judges are very unlikely to grant motions *in limine* requesting permission to argue nullification, and if such a motion is made, judges are likely to expressly forbid any nullification arguments.

The best practice therefore is to avoid alerting the judge or the prosecution of the defense's intent to raise jury nullification, and risk a ruling that further circumscribes counsel's behavior. Freedman, M., *Jury Nullification: What It Is, and How to Do it Ethically*, 42 Hofstra L. Rev. 1125, 1134 (Summer 2014).

6. Seek a General Verdict Form Rather Than a Special Verdict Form.

In the prosecution of Dr. Benjamin Spock for aiding and abetting draft evasion in protest of the Vietnam War, a case where the defense was pushing for jury nullification, the jury was given a verdict form that asked it to make specific factual findings on each element, in addition to a general verdict. *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

The First Circuit reversed Dr. Spock's conviction, holding that he was entitled to a verdict form free from the specific factual findings. The First Circuit was concerned that the jury would feel compelled to logically,

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and impermissibly, step from one factual finding to the next, and that "there is no easier way to reach, and perhaps force, a verdict of guilt than to approach it step by step." The court held that the jury "must be permitted to look at more than logic," was free to reason its way to a verdict free from the court's direction, and that a criminal defendant must be afforded "the full protection of a jury unfettered, directly or indirectly." *Id.*

While general verdict forms are typical in criminal trials, in light of Seventh Amendment concerns stemming from the Supreme Court's rulings in *Apprendi*, more and more specific factual findings may be put to jurors. Counsel seeking jury nullification should be mindful of the effect these specific factual findings may have on the perceived freedom of jury to reason its way to a verdict as it sees fit, and not be forced into the step-by-step analysis that a verdict form with specific factual findings may force. In other words, a jury that does not need to make specific factual findings may be more likely to exercise its power to nullify.

7. Consider dual purpose arguments—arguments that are grounded in an independent legal basis even if they also support nullification.

As the D.C. Ethics Opinion makes clear, just because an argument has the capacity to heighten the jury's awareness of jury nullification, doesn't necessarily mean that argument is impermissible. One must evaluate whether there is an independent legal basis to make the argument. So for example, one of the things the jury must evaluate is whether the defendant is guilty or not guilty, whether the defendant is a criminal or not a criminal.

While using the phrase "jury nullification" may be impermissible, reminding the jury that it's the conscience of the community may be helpful.

While it would typically be inappropriate to argue that if the defendant is convicted, he will face a mandatory minimum prison sentence, it may not be problematic to remind the jury that by convicting, they are branding the defendant a criminal. So while pointing out the punishment a defendant would face if convicted such as prison time, or sex offender registry, may be problematic, pointing out the fact that defendant may be convicted because it is an integral part of the jury's role, would seem less problematic.

Similarly, while using the phrase "jury nullification" may be impermissible, prompting an objection and risking broad prohibitions from the court, certain phrases about the role of the jury in the administration of justice may be helpful. So, for example, if the prosecution is free to resort to arguments that the jury acts as "the conscience of the community," it would seem unfair to prevent the defense from making that exact same argument.

Similarly arguments like asking the jurors "to resort to their common sense," or pointing that "in our system, people are not necessarily guilty just on the basis of logic," may not be problematic. *See Spock* at 181-183 (holding that "Uppermost . . . is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic.").

Furthermore, pointing out that a jury's finding of "not guilty" is not a decision that the court reviews, or that the jury can be punished for, would also seem to be fair game, as it is an accurate statement of the law.

As a result, unless local practice or a court ruling has been made to the contrary, counsel should consider crafting an argument that "heighten[s] the jury's awareness of its capacity to nullify." Consider for example the defense closing argument in *Spock*:

> As an American jury, you play a unique role in American justice. You are pure democracy in action—a group of American citizens, called from the community, to decide whether Dr. Benjamin Spock will be convicted as a felon, or whether he will be given his freedom. To make that decision, you have been chosen for your intelligence and for your common sense.
>
> In addition, as recognized by the Framers of the United States Constitution and by the Supreme Court, you are not just a fact-finding machine. You represent the conscience of the American community, a conscience that can be used to prevent both unjust convictions and unjust punishments.
>
> The judge decides the law, and you are bound to follow his instructions on the law. But you hold the only power in the world to decide the facts in this case. In our system, people are not necessarily guilty just on the basis of logic. That's why Dr. Spock has a jury—that's why he has you—and not just an unfeeling fact-finding machine.
>
> So only you can make the factual determination of whether Dr. Spock is guilty or innocent, whether he should be convicted as a felon, or whether he should be free to go, a free man in a free society. No one else in the world, or in this country, has that power—not the President of the United States, not the U.S. Congress, and not Judge Ford.
>
> As I said, you have been chosen for your intelligence and your common sense, and for your sense of right and wrong. So, if your intelligence, your common sense, and your sense of right and wrong, tell you that the prosecution has succeeded, beyond a reasonable doubt, in proving that Dr. Benjamin Spock is a criminal, and deserves to be punished as a criminal, then you must find him guilty.
>
> But if, in your common sense, and in your sense of right and wrong, you have a reasonable doubt whether Dr. Benjamin Spock is a criminal, and if your common sense, and your sense of right and wrong, tell you that Dr. Spock does not deserve to be punished as a criminal, then you should find him not guilty.
>
> And if you do find Dr. Spock not guilty, then no power on earth can contradict your decision that he is not guilty, and no power can punish you for finding him not guilty—not the President, not the Congress, and not the judge.

Although post-conviction juror interviews revealed a strong temptation to nullify, the jury convicted Dr. Spock. While Dr. Spock's conviction was overturned by the First Circuit, there does not appear to be any suggestion that defense counsel's argument was improper. As a result, while one cannot say with any degree of certainty that this argument was proper, it does appear to have been effective at "heighten[ing] the jury's awareness of its capacity to nullify" and there's no indication counsel was reprimanded for making this argument.

Conclusion

While the law on jury nullification may appear confusing, the knee-jerk reaction of most—to simply dis-

card jury nullification as a tool in the criminal defense lawyer's toolbox—may be hasty. Precisely because jury nullification is a potentially effective tool for any zealous advocate, due consideration needs to be given to how it can be employed, if at all, to achieve a just result.

LW ISSN 0148-8139