# PUTTING ON A JURY NULLIFICATION DEFENSE AND GETTING AWAY WITH IT

by John Wesley Hall, Jr.
Little Rock, Arkansas
Author, PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER (2d ed. 1996; 3d ed. 2004)
Secretary (2003-04), NACDL

Fully Informed Jury Association
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## DEFENSE LAWYERS AND JURY NULLIFICATION

[From the 2003 Supp., ©2003 West Group, reprinted by permission — The discerning reader will note that Conrad's article (following at page 12) and book provided the platform for all my research on this prior to 2001. Blame him for all the citations prior to then.]

**§ 9:25 Presenting jury nullification** [i] **Comment:** This section only covers an ethical and practical overview of the issues involved in defense counsel's attempt to present jury nullification. For the history and development of jury nullification, most of these books and articles contain an historical discussion. The most comprehensive is Conrad's excellent book.

Sometimes the only "defense" for a client is jury nullification. This arises from different scenarios, including: the prosecutor made no plea offer that the client could accept and the client has nothing to lose and everything to gain from a trial; or the client needs to explain to the jury his or her reasons for acting as he or she did so as to not sound irrational or subhuman.[ii]

Jury nullification always has been a controversial subject, and it has a long and checkered history, which need not be repeated here. Jury nullification has been recognized since the beginning of the common law, but it fell into disuse with the advent of legally trained judges.[iii]

Before the ready availability of statutes and cases by the bar and even the public, jurors in many states had the power to determine both the law and fact applicable to the case. In 1802, Supreme Court Justice Samuel Chase was impeached for not permitting a jury, while sitting as a Circuit Justice, to determine the law applicable to the case. Chase was not convicted, however, and the movement away from juries deciding questions of law was thus in full swing. Nevertheless, the courts have always recognized that juries have the power, but not the right,[iv] to grant mercy or to nullify simply by refusing to convict, even where the facts are virtually uncontroverted,[v] no questions asked.

Many prosecutors[vi] and courts[vii] counsel against permitting jury nullification at all. Judges often feel constrained to construe relevance issues to exclude evidence offered for no other purpose than to nullify.[viii] In 2003, the District of Columbia Bar issued an opinion that states that it is not unethical to pursue a jury nullification defense.[ix]

Prosecutors are always on guard against nullification by questioning jurors in voir dire whether they can follow the law, even if they might disagree with it.[x] For example, in drug cases, prosecutors universally want to know whether jurors feel that victimless crimes should not be prosecuted. In jury sentencing states, prosecutors want to know that the jury can consider the full range of punishment and the effect of mandatory minimums. Prosecutors sometimes file motions in limine to cut off jury nullification arguments.[xi]

techniques in the trial division of the court); United States v. Sanusi, supra. If nullification is the only defense, counsel should consult with the accused before embarking on it.[xix]

Lawyers generally are told that they cannot mount a frivolous defense, but the Sixth Amendment right to a jury trial and its concomitant duty on defense counsel require that criminal cases be viewed differently. Two Rules of Professional Conduct govern:[xx]

Rule 1.2 provides as follows:

> **Rule 1.2. Scope of representation.**
>
> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> . . .
>
> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Rule 3.1 of the Rules of Professional Conduct provides as follows:

> **Rule 3.1. Meritorious claims and contentions.**
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

This is all in recognition of the maxim that "[i]t is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."[xxi]

As stated in § 9:3, defense counsel has an ethical and Sixth Amendment duty to zealously represent the interests of the client. This includes pursuing a jury nullification defense if that is the only defense the client has. The client has a right to insist on a trial and putting the government to its proof, no matter how suicidal it may seem to the criminal defense lawyer.[xxii] Implicit in this must be that defense counsel can pursue jury nullification as best he or she can under the constraints that the trial judge will impose, even if it is just to show that the client's motivations were not evil,[xxiii] even if only for sentencing purposes.

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[*30] Although all criminal trial juries have the power to nullify the law, few jurors come to court aware of their powers – and in most cases, jurors never learn of them during trial. A lawyer who believes his client would be found 'not guilty' by a jury aware of its power to return a verdict according to conscience is faced with a perplexing dilemma, especially in cases where the defendant has no persuasive factual or legal defense. While a lawyer's ethical duty is to zealously represent his client, he must also comply with the rules of court and any applicable rules of evidence. The lawyer must find ways to put this decision before the jury surreptitiously, without going so far as to be cited for contempt. Although the best defense attorneys frequently do just that on an ad hoc basis, the techniques and strategies involved are rarely identified or discussed.

There are many permissible strategies available to communicate this otherwise forbidden information to the jury. Many techniques used to bring about an independent verdict are simply good advocacy, part of your stock in trade. It is neither advisable nor practical to write a complete "how-to" on presenting a nullification defense. This article is intended to give lawyers handling cases where nullification may be appropriate a conceptual framework within which to organize their defense. A dialogue on these points may be useful to the criminal defense bar, and this is an area where the published literature is incredibly sparse.

***Is Seeking Jury Nullification Ethical?***

Some defense attorneys have ethical concerns about seeking a nullification verdict, to believing that they have taken an oath to uphold the law which would be violated by a deliberate attempt to circumvent the law or have the jury "violate" their oath. Courts don't usually share that concern. The Second Circuit, in U.S. v. Sams,[xxxvi] held that a lawyer may "satisfy the *Strickland* standards while using a defense with little or no basis in the law if this constitutes a reasonable strategy of seeking a jury nullification verdict. . . ." Defense attorneys not only should be aggressive in seeking nullification in an appropriate case, but may even be ethically required to do so where no other avenue of defense exists.

This is not to say that a defense lawyer can reasonably forego viable fact or law-based defenses and attempt to plead his case solely on equitable or conscientious grounds. It is certainly an unreasonable gamble to completely ignore other defenses and to urge jury nullification alone, when more conventional defenses are available. Another federal circuit has

hoping that for equitable reasons the jury will give such defenses more weight than they may legally merit. Sometimes this is referred to as a "shadow defense." One example would be where defense counsel argues that the prosecution has failed to prove specific intent or some other element of the crime, even though the evidence is strongly against them. The defense may attempt to argue "entrapment" or "necessity," even though all the elements of those defenses may not be presented by the facts. Yet this shadow defense gives the jury a "peg to hang their hats on" should they strongly want to acquit and need an excuse to do so.

Jury nullification is often the result of a successful shadow defense. Jurors may consciously or subconsciously decide to give these defenses more credibility than they merit, in order to reach a comfort level with acquitting. As one recent article states, these "collateral issues [may] act as a surrogate for the jury's true discomfort with the propriety of the conviction itself."[xli] Often, jurors may not even realize they are nullifying – they may simply rationalize reasonable doubts into a fully proven case, if they are convinced "not guilty" is the only reasonable verdict.

Finally, conscientious arguments may be integrated into a strong fact or law-based defense. It can only strengthen any defense if the jurors want to acquit.

Requesting the court to either 1) instruct the jury about its nullification powers or 2) allow the defense to mention nullification during voir dire and argument, is almost certainly futile, unless there has been grossly unconscionable conduct on the government's part. Very rarely, a court may grant such a request when governmental misconduct has palpably exceeded the bounds of civilized behavior, as in the "Camden 28" case, *U.S. v. Anderson.*[xlii]

In *Anderson,* the government successfully infiltrated a group of war protestors with a paid informant. The informant provided the protestors with tools, supplies and transportation needed to break into a Selective Service Office in order to steal and destroy draft records. The informant taught them how to use the tools, rented trucks for them to use in the burglary, and provided groceries for several weeks while he trained them to commit the crime.

Judge Clarkson S. Fisher initially told the jury it was bound to follow his instructions, but later reversed himself, saying "if you find that the overreaching participation of Government agents or informers in the activities . . . was so fundamentally unfair as to be offensive to the basic standards of decency . . . you may acquit any defendant to whom this defense applies."[xliii] He then allowed defense attorney David Kairys to explain the doctrine of jury nullification to the

an important line of testimony by too narrowly construing his case.[xlvii] A shadow defense, such as entrapment or necessity, may be selected to open up the theory of the case, allowing for evidence of governmental misconduct or the ethical (if not practical) necessity of the defendant's actions.

Attempting to present evidence whose "only purpose . . . would be to invite jury nullification" may result in the trial judge deeming all such evidence inadmissible.[xlviii] Courts have held that defendants have "no right to present evidence relevant only to [a nullification] defense."[xlix] Moreover, where the evidence sought is only marginally relevant on one or more issues in the case, the evidence may be excluded if the trial judge deems it is "being sought to discredit the government and obtain an acquittal based upon any nullification."[l] The evidence must be fairly relevant upon some issue in the case other than nullification.

Integrating a shadow defense expands the scope of admissible evidence. A claim of duress or self-defense can open the door to discussion of the character and past history of whoever exerted the force or threats. A defense of entrapment opens the door to the behavior and credibility of the police officers involved and any informants they used. A necessity defense opens the door to evidence of the consequences the defendant faced had he not taken the prohibited actions. A defense of insanity gives the defense an opportunity to put the defendant's whole life in front of the jury, instead of just the moments when he committed some criminal act. A shadow defense that is compatible with the facts of the case can provide a justification for admitting the nullification evidence needed.

Most courts take a liberal view of admissibility, if credible grounds for admitting the evidence exists. "The court in a criminal case is reluctant to substitute its judgment for a defendant's on the question of whether such evidence is "necessary or critical" to a defense. It is sufficient that a compelling argument of cogency can be made."[li] The important lesson is that an attorney presenting a jury nullification defense must become adept at framing his theory of the case broadly and finding relevant legal issues to justify admitting the evidence he needs.

***Empowering the Jury***

In order to convince a jury to nullify, counsel must communicate several concepts. These concepts should be woven into the defense theory and themes, and reinforced at every opportunity during trial. First, counsel must convince the jurors that applying the law according to the case before them would just not be right. Although there are infinite ways to get this

themes during all stages of the jury trial: voir dire, opening statement, presentation of evidence, and closing argument. Each stage presents different goals, opportunities and obstacles, that counsel must be equipped to confront before they arise.

*Voir Dire*

The first step in voir dire is knowing what qualities you need in your jurors. Most attorneys concede they do not want an unbiased jury – they want one biased in their favor. In a nullification case, the defense needs jurors who are willing to think and act independently, skeptical of government and authority, sensitive to the conscientious issues involved, and able to stand up to pressure.

Voir dire presents counsel with a first opportunity to introduce jurors to the factual and legal issues in the case.[lvii] During voir dire, counsel has an opportunity to present the jurors with reasons to question whether the law can be conscientiously applied in the case before them. By asking questions that test the juror's value system and examine their reactions to the sort of situation the defendant was in, the entire panel can be educated and sensitized as to the innocent reasons the defendant had for his actions, and to the harmless nature of the defendant's conduct.

Judges have a great deal of discretion to decide how voir dire will be conducted.[lviii] In federal courts, voir dire is usually conducted by the trial judge, [*34] although federal judges have discretion to allow attorneys to conduct voir dire directly. State courts are slightly more liberal and normally allow attorneys for both sides to conduct their own voir dire, yet limit the time allowed. Courts may curtail questioning at any time if they believe that questioning is straying into impermissible areas, is repetitive, or that further voir dire is of no useful purpose.

Voir dire can – and in a potential nullification case, probably should – be used to instruct the venire about the purposes of jury trial, and to find out what the venire members think trial by jury is all about. Courts will not generally allow the defense to raise the issue of nullification directly, so the defense must find permissible or protected ways to get this information before the venire. One of the least objectionable techniques may be to quote the Supreme Court's decisions describing the role of the criminal trial jury and to get the venire members talking about them. For example, counsel may inform the venire that "a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community, as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[lix] By reinforcing facts which make it difficult for

defendant should be convicted, that belief would influence their verdict. This line of inquiry reinforces the venire members' independence and autonomy from the judge. One useful resource in this context is Justice Byron White's words: "When juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[lxi]

Informing the venire that it is only the jury's verdict that matters, and that the defendant is not concerned with whether the judge thinks he is guilty or innocent, should get their attention and make them aware that the ultimate power in the courtroom is in their hands. Jurors should be informed that in the entire edifice of government, only the jury can convict a citizen of crime, and that in this regard they are more powerful than Congress, the Supreme Court and the President put together. The defendant has chosen the "common sense judgment of the community . . . in preference to the professional or perhaps overconditioned or biased response of a judge,"[lxii] and the jurors may be reminded that it is their judgment, not that of the judge, that matters.

The defense has to decide, prior to voir dire, whether to have the defendant appear either pro se or as co-counsel. While a competent defendant has an absolute right to appear pro se (provided he refrains from disrupting the proceedings),[lxiii] he may only appear as co-counsel with the permission of the court,[lxiv] and only in those jurisdictions whose laws allow it.[lxv]

The pioneer jury consultant Cathy E. "Cat" Bennett pointed out that having a defendant personally conduct part of the voir dire humanizes the defendant, which is especially important when the defendant is accused of a brutal or senseless crime: "it's amazing how it's so much more difficult to send someone to the gas chamber you have had a conversation with, that you've heard talk, that you've seen people touch."[lxvi] When a defendant represents himself, trial judges often allow a wider range of argument and questioning than legal counsel would be permitted.[lxvii] Jurors may identify with the non-professional pro se defendant, and may resent any efforts of the judge to shut down the defendant's sometimes awkward and stumbling efforts at presenting his own case.

However, as Dr. Jack Kevorkian's trial shows, some defendants make lousy lawyers. If the defendant is going to appear pro se, he needs to learn a lot of law, quickly, and be able to present himself well. Even the best stand-by counsel cannot help a pro se defendant who does not know how to introduce evidence or present facts cogently to the jury.

*Opening Statement*

As opposed to voir dire, which is ideally a dialogue between the attorney and venire-members, opening statement is an opportunity for the defense to tell the jury a story. As one criminal defense lawyer pointed out, any parent – or former child – should know that a good story has both a theme and a moral.[lxx] Defense statements in nullification cases revolve around themes such as "defendant as victim," "defendant acting on irresistibly good impulses," "defendant has suffered enough," etc. For a nullification defense, the jury should be left offended, shocked or outraged that the defendant is facing prison for acts the jurors do not find blameworthy (or perhaps even find commendable), or that the prosecution is seeking to further torment some hapless, unfortunate defendant. Of course, the jury should be aware that they are going to have to determine the moral of this story, and whether the story is to have a happy ending.

During opening statement, the jury must be made aware of the defense's theory of the case, and given a coherent theme or themes to which the defense will then return throughout trial. While counsel can not argue jury independence explicitly, he may show that his client is the "good guy" in the story, and that the prosecutor or the witnesses against his client are the "bad guys." It is during opening statement that jurors gets their first real picture of what happened. Opening statement in a nullification case should leave the jury uneasy about convicting the defendant, and make them identify or empathize with the defendant's situation.

One purpose of opening statement is to build rapport with the jury. The defense attorney needs to establish credibility with the jurors so that they will be at least willing to consider the possibility that his client is being prosecuted unfairly, and that the government is overreaching. It is possible to concentrate on the ethical issues in the case by focusing on what the evidence will show the defendant was thinking, what his motives were, what his intent was. By focusing on evidence reflecting the defendant's state of mind, counsel can effectively build empathy between jurors and the defendant.

Prosecuting attorneys almost always try to connect with the jury by claiming to represent "the people of" the United States, or the state. Counsel may object, in front of the jury, to the prosecutor claiming to represent "the people." Objecting that the prosecutor represents the government, and that the jury represents "the people" shows the jury that the prosecution is posturing and attempting to manipulate them, and shows them they have an independent role to play which the prosecutor is attempting to usurp. The judge will almost never grant this

nowhere in the text of The American Jury.[lxxi] In fact, jurors most often base their verdicts solely on the law and evidence (as in the vast majority of criminal cases, they undoubtedly should).

What is true is that if the opening statements give an accurate image of the evidence to be presented, then the juror's view of the case after the evidence is in would be the same as at the end of opening statement. In light of that, it is important for the defense to be scrupulously accurate about what the evidence will show, and to give the jurors an ethical framework in which to consider that evidence. The jurors must be empowered to view the evidence from an ethical, as well as factual, perspective, if they are to deliver a conscientious verdict.

***Presentation of Evidence***

There are no limits to the types of evidence the defense may choose to present in a nullification case. The facts the defense needs to present will depend on their theory of the case, what factors the defense is hoping will motivate the jury to nullify. Commonly presented are the punishment, the defendant's motivations, and the conduct of the police or other officials in prosecuting the defendant.

The right to cross-examine and impeach witnesses is constitutionally protected by the Sixth Amendment right of a defendant "to be confronted with the witnesses against him,"[lxxii] even though impeachment testimony may be inadmissible for other purposes. A significant denial of the right to confront a witness is a "constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it."[lxxiii] Impeachment testimony can lay the foundation for an independent verdict. The character and past record of an informant may impugn the integrity of the prosecution. Further, the informant's prison record or the fact that he has "cut a deal" to testify may be used to inform the jury as to the draconian penalties the defendant faces if convicted.

Punishment is usually considered irrelevant at trial.[lxxiv] The jury is only supposed to consider the factual guilt or innocence of the defendant and not the ramifications of their verdict. The greater the punishment, however, the greater the injustice of an ethically unwarranted conviction. Counsel should watch for opportunities to inform and to remind the jury of the potential sentence the defendant faces, especially in cases where the sentence is harsh and unconscionable. In most states and all federal courts, the imposition of punishment is determined by the court and the range of punishment is consequently inadmissible, unless this information can be admitted for some reason other than to convince the jury to nullify. Luckily, there are

motives, acts and concerns to the jury. Only the defendant can humanize his position, and allow the jurors to see and understand his actions through his own eyes. This perspective may be essential to activate their moral sensibilities, and to get them to act upon them.

This tactic may not work when a defendant hopes the jury will find the law itself unjust, as opposed to cases where the defendant hopes they will find the application of the law unjust. The chemotherapy patient on trial for smoking marijuana may be able to gain an advantage by taking the stand and explaining what he was doing and why. The person who smokes marijuana for recreational purposes and hopes the jury will believe marijuana should be legal will be in a much weaker position. This is because the former's personal story will add to his argument and justification; the latter defendant will have little to add to his essentially political argument.

Another important issue to examine is the behavior of the police and prosecution. When the defendant has been beaten, harassed or abused by the police, these facts should be brought before the jury. [*37] Evidence which impeaches a witness is per se admissible in a criminal trial. The fact that the police have offended community values – or even themselves broken the law – in a single-minded quest to arrest the defendant can be very persuasive, especially where police actions are less acceptable to the jurors than those of the defendant.[lxxviii] Understanding what sort of official misconduct may have been condoned in order to apprehend and punish the defendant puts the defendant's actions into context and allows the jurors to make a reasoned decision as to whether the police should be rewarded with a conviction upon this particular set of facts.

***Closing Argument***

Closing argument is the last opportunity defense counsel has to speak to the jurors. Although the range of permissible argument is broad, in general both sides are expected to limit their argument to the evidence (including reasonable inferences to be drawn from the evidence), pleas for effective law enforcement, the law as contained in the court's charge, and responses to the arguments of opposing counsel.

During closing argument, the defense must not only be prepared to persuade the jurors to act on their moral sensibilities (which, by now, they have been made acutely aware of), but he must also be prepared to counter both the court's instructions and the arguments of the prosecution. The defense may not stray too far from arguing the facts as they relate to the law as given in the courts "charge," or instructions to the jury. Courts often instruct jurors using words

> This is a time in our country when people are questioning the necessity of maintaining many of our political institutions. It's a time when many people are distrustful of elements in our government from the highest office in the land to the lowest on the county level. But I suggest to you that the last bastion between the individual and the mighty power of the State is the jury system. Only the jury is the last dignified, uncorrupted body politic in this country. No one can tell a jury what to do.[lxxx]

Criminal defense attorneys are often criticized for attempting to appeal to the emotions of the jury; jurors are just as often criticized for responding to emotion instead of reason.[lxxxi] While these allegations are disingenuous (prosecutors routinely emphasize the emotional aspects of cases),[lxxxii] they do call into question the practice of making an emotional plea to the jury.[lxxxiii] Frequently, defense attorneys and prosecutors alike appeal to jurors to "send a message," following the verdict in the O.J.Simpson murder trial defense pleas of this sort were referred to as appeals for a nullification verdict.[lxxxiv] However disfavored emotional appeals may be in the media or law schools, the criminal defense attorney seeking a nullification verdict should not only provoke, but validate the emotional responses of the jury, and vindicate the right of jurors to take those emotions with them into the jury room.

The possibility of making a "plea for effective law enforcement" is usually overlooked by defense lawyers in constructing their closing arguments. This plea is almost exclusively made by the prosecution, and urges that the jurors have a civic duty to enforce the law. A typical prosecution plea for effective law enforcement might go something like this:

> Ladies and gentleman of the jury, you've seen a lot of police officers come in here and testify in this case, and Officer Murphy told you about being shot at, about the kinds of risks these Officers face in their job every day. They go out there and find the bad guys, ladies and gentleman, and that is hard and dangerous work. And after they find them, we get to prosecute them, and we take them in front of a jury of twelve citizens just like you. And all the work of these Officers goes to naught if the twelve of you won't do your job, and convict criminals like Mr. Defendant here. If you are not going to do that, then all these Officers are risking their lives for nothing.

However, in a nullification case a plea for effective law enforcement can be used by the defense:

While some tactics aimed at obtaining [*39] a nullification verdict may be forbidden by the court, the defense attorney should be prepared to resort to other techniques without becoming disheartened. No single technique will prevail in all cases; no trial judge will be able to forbid all avenues of reaching the jury with this information without eventually denying the accused a fair trial, and subjecting himself to reversal on appeal. The attorney who actively seeks nullification must be prepared to test the limits of what the court will allow; he must have his law, history and logic well-prepared before going into court. If the advocate explores enough paths for the presentation of this information, he stands a reasonably good chance of success.

***'Prevent Oppression by the Government'***

Defense attorneys should aggressively seek nullification in cases where their guilty clients are morally blameless. Criminal defense work involves pitting the defense against the organized and potentially oppressive power of the state. If the criminal jury is to perform its function of preventing oppression by government,[lxxxvi] the defense attorney must be willing to fight oppression even when sanctioned by formal law. Supreme Court Justice Brandeis reportedly said that "The best way to have the law respected is to make the law respectable." Jury nullification helps keep the law respectable by keeping it in line with the conscience of the community. Such a task is not one a criminal defense practitioner should shy away from.

Jury nullification should be recognized for exactly what it is: proof that nullified laws lack adequate social support to be consistently enforced. Laws which are regularly nullified are laws that should change. Juries are a necessary feedback loop in the legislative process. When laws cease to be accepted by jurors, they should be stricken or modified by responsive legislation. Independent juries can reduce the lag between social and legal change, a problem that has always proven intractable. Today, with jury independence minimized by controlling courts and procedural codes, juries are prevented from performing their essential functions. We are not listening to our jurors; even worse, we are not allowing them to speak. Jurors are the citizens most intimately involved in the criminal justice system. If the opinions of jurors are not worth listening to, then we can quit wondering whether citizen input has any impact on the development of our laws. We can be assured it does not.

Independent juries are not a Utopian scheme. It is not imaginable that they will always provide perfect justice. The question is not whether independent juries will always present the correct verdict, but whether they will dispense better verdicts more often than not. It is difficult

> casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

[vi] Cf. Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy,* 85 Geo. L. J. 191 (1996), cited in note 109. The author is does not contend that it is unethical for defense counsel to pursue jury nullification. Rather, he is providing prosecutors with guidance to head off nullification since there is no right to present it as a defense.

[vii] United States v. Sepulveda, 15 F.3d 1161, 1189-90 (1st Cir. 1993), cert. denied 512 U.S. 1223 (1994); Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994) ("counsel may not press arguments for jury nullification in criminal cases"); United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997) ("[N]o jury has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court."); Commonwealth v. Leno, 415 Mass. 835, 616 N.E.2d 453, 457 (1993).

[viii] United States v. Griggs, 50 F.3d 17 (9th Cir. 1995); United States v. Johnson, 62 F.3d 849, 851 (6th Cir. 1995); United States v. Malpeso, 115 F.3d 155, 162 (2d Cir. 1997).

[ix] D.C. Bar Op. 320 (May 2003), agreeing with United States v. Sams, 104 F.3d 1407 (D.C. Cir. 1996), cited in § 9:27 n. 136 (ineffective assistance claim), that good faith arguments for jury nullification are not unethical: "Good faith arguments with incidental nullification effects do not violate the Rules of Professional Conduct" as long as there is "an[ ] evidentiary argument for which a reasonable good faith basis exists, provided that the lawyer exercises his ability to do so within the constraints of existing law."

[x] Warshawsky, supra, at 224-27.

[xi] *Id.* at 228-31. Examples are: Zal v. Steppe, supra, note 110 (where the prosecutor moved in limine to prevent defense counsel from using certain inflammatory words and phrases at trial and defense counsel repeatedly violated the trial court's order not to use them); United States v. Malpeso, 115 F.3d 155, 162-63 (2d Cir. 1997) (proffered evidence was irrelevant or more prejudicial than relevant); People v. Douglas, 178 Misc.2d 918, 680 N.Y.S.2d 145 (Bronx Co. 1998) (prosecution entitled to instruction that the propriety of a search and seizure is not a question for the jury).

[xii] See the book and articles by Conrad, note 109, supra.

[xiii] Jack B. Weinstein, supra, note 109, 30 Am. Crim. L. Rev. at 251. Further, *id.:*

> There is a danger, however. A defendant may so open the door to prejudicial material by the prosecution or so turn a simple issue-of-fact trial into a political debate as to warrant the court's employing a strict view of relevancy even where a reasonable nullification argument exists. Judges will have to use their discretion sensibly under the Rules.

(1992).

See also ABA Standards, Defense Function, Std. 4-5.2(b) (3d ed. 1991):

> Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

[xxii] Defense counsel also has a duty to dissuade the client from any defense that is virtual suicide in front of the jury. See cases cited in note 126, supra.

[xxiii] Zal v. Steppe, supra, 968 F.2d at 934:

> As counsel for those accused of a crime, Zal had an obligation to them to present their defense and to present it not halfheartedly, not mechanically, but zealously. The duty of advocacy, the commands of our profession required no less. Zal, accordingly, had the right to bring out the reason for his clients' actions. Even if the reason for the actions did not constitute a good defense under the applicable law, an explanation allowed the jury to see his clients not as monsters mindlessly invading the rights of other, but as human beings.

Weatherall v. State, 73 Wis.2d 22, 242 N.W.2d 220, 224 (1976), cert. denied, 429 U.S. 923 (1976):

> Rejecting entrapment as an appropriate theory of the case for the defense, trial counsel instead opted to conduct the trial and made his plea to the jury under a "Good Samaritan" approach. Given the denial of one sale and the admission by his client of the other two sales, counsel sought to increase the possibility of the jury accepting his client's denial as to the first sale by portraying his client as one who had sought only to help someone in trouble and distress. Establishing such intent to help, rather than to profit, would not be a legal defense under the statute defining the crime charged. However, such attempt to put his client in the most favorable light possible, if successful, might incline the jurors to accept, on the issue of credibility, the testimony of the defendant rather than that of the undercover agent as to the first sale, the only one denied by defendant. Our court has taken judicial notice of the fact that juries do, on occasion, temper justice with leniency. As an experienced criminal lawyer, trial counsel was entitled to give weight to such extra-legal possibility. He is no more to be faulted for such exercise of professional judgment than is the defense counsel who, facing formidable adverse facts, advises his client to plead guilty, perhaps on a lesser charge, rather than to go to trial on a plea of not guilty. Later on, postconviction counsel may not agree with the advice given and followed, but that is always later on.

[xxiv] Strickland v. Washington, 466 U.S. 668 (1984).

[xxviii] See, e.g., United States v. Sams, 104 F.3d 1407, 1996 WL 739013 (D.C.Cir.1996) (table; text in Westlaw) (dicta); Sams v. United States, 1999 WL 680008 (D.D.C. 1999) (not per se ineffective assistance); United States v. Horsman, 114 F.3d 822 (8th Cir. 1997) (harmless error at best in light of overwhelming evidence of guilt; possibility of jury nullification on retrial would not translate into prejudice, quoting Gonzalez, note 112 (not a "right," much less a "substantial right"); cite>Weatherall v. State, 73 Wis.2d 22, 242 N.W.2d 220, 224 (1976), cert. denied, 429 U.S. 923 (1976), quoted in note 130, supra; People v. Schreck, 2001 WL 1039650 (Mich. App. Sept. 7, 2001) (in light of overwhelming evidence and lack of other defenses); State v. Lemmers, 153 N.W.2d 398, 451 N.W.2d 805, 1989 WL 165498 (Wis.App. 1989) (table, unpublished; text in Westlaw) ("Such a defense, commonly known as 'jury nullification,' is a recognized criminal defense strategy. . . . That the strategy proved unsuccessful does not transform the decision to pursue it into deficient performance.")

But see United States v. Hernandez-Ocampo, 985 F.2d 575, 1993 WL 22378 (9th Cir. 1993) (table, unpublished; text in Westlaw) (if jury nullification were the defense here, it would have not been a reasonable one; but apparently none would anyway).

[xxix] Capps v. Sullivan, 921 F.2d 260, 262 (10th Cir. 1990) ("[W[hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy rather than to raise an entrapment defense that has some support in the evidence.").

[xxx] Untied States v. Montgomery, 2001 WL 845644 (6th Cir. 2001) (Table, unpublished; text on Westlaw) (sole strategy was one of nullification where elements of crime were not disputed; not clearly erroneous to deny acceptance of responsibility).

[xxxi] Weinstein, note 109, supra.

[xxxii] People v. Wilson, 972 P.2d 701, 705-06 (Colo. App. 1998) (argument should have been avoided, but it was not reversible error where it came in response to defense).

[xxxiii] Conrad, The Champion at 33, note 109, supra.

[xxxiv] Fed. R. Evid. 401.

[xxxv] United States v. Sanusi, note 122, supra.

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[xxxvi] 104 F.3d 1407 (D.C. Cir. 1996) (unreported).

[xxxvii] Capps v. Sullivan, 921 F.2d 260, 262 (10th Cir. 1990).

[xxxviii] Old Chief v. U.S., 519 U.S. 172, 187-188 (1997).

[xxxix] *See* United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Boardman, 419 F.2d 110 (1st Cir. 1970); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Basic Books, 1994).

[lvi] Often, people are willing to commit horrible injustices at the command of people in authority, because they feel no personal moral responsibility for their actions. *See* Stanley Milgram, *Behavioral Study of Obedience,* 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963). Jurors must feel personally empowered and involved if they are to rise above their tendency to mechanically obey authority figures and act on their own judgment.

[lvii] Powers v. Ohio, 499 U.S. 400, 412 (1991) stated that "the voir dire phase of the trial represents the 'jurors first introduction to the substantive factual and legal issues in a case.'" Quoting Gomez v. United States, 490 U.S. 858, 874 (1989).

[lviii] *See* Rosales-Lopez v. United States, 451 U.S. 182 (1981).

[lix] Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

[lx] Id.

[lxi] Id. at 157, referring to HARRY KALVEN AND HANS ZEISEL, THE AMERICAN JURY (1966).

[lxii] Id. at 155.

[lxiii] Faretta v. California, 422 U.S. 806 (1975).

[lxiv] Id. at 810.

[lxv] *Compare* O'Reilly v. New York Times Co., 692 F.2d 863, 869 (2d Cir. 1982) (decision whether to let defendant appear as co-counsel is within discretion of trial court) with Linnen v. Armainis, 991 F.2d 1102, 1106 fn.3 (3rd Cir. 1993) (defendant never permitted to appear as co-counsel for himself in Pennsylvania state court).

[lxvi] Cathy E Bennett, Orientation-Voir Dire, National College for Criminal Defense Audio Recording 346 (1982).

[lxvii] *See* Hon Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification,* 28 CASE W. RES. L. REV. 269 (1978): "In a criminal or civil jury trial, the pro se litigant, like counsel, is subject to the contempt powers of the court. But he is not subject to the discipline and the effect of any continuing relationship with the court and the organized bar. Thus, he is not subject to the same degree of control which a court has over counsel. . . . The result is that is far easier for the pro se litigant to argue that the jury should exercise its nullification power than for counsel to do so."

[lxviii] See Crossfire, October 1993, quoted in Crossfire: Mandatory Minimums Meet FIJA, 14 THE FIJ ACTIVIST 1 (Winter, 1994).

[lxix] *See, generally,* ABRAMSON, WE, THE JURY, supra note 20, 143-176 (1994).

Defense, 91 MICH. L. REV. 1703 (1993).

[lxxxiv] *See* Tony Perry, THE SIMPSON VERDICTS; Snubbing the Law to Vote on Conscience; History: If Simpson's acquittal was a message about racism, panelists exercised a controversial American legal tradition: jury nullification, 10/5/95 LA. TIMES at 5: Prosecutor Marcia Clark complained that Cochran was using a forbidden "jury nullification" argument in closing statements. Judge Lance A. Ito responded that Cochran's argument had indeed been "artful" on that point.

[lxxxv] MOSES, supra note 45, 5-54.

[lxxxvi] Duncan, supra note 24, 155-156.

[lxxxvii] Dougherty, supra note 4 (CJ. Bazelon, dissent).