

JURY NULLIFICATION: WHAT IT IS, AND HOW TO DO IT ETHICALLY

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I. INTRODUCTION

In the late 1960s, Dr. Benjamin Spock was active in opposing the War in Vietnam, which he and many others had come to regard as illegal and immoral.¹ As a result of various anti-War activities, Spock and four others were prosecuted in federal court in Boston for conspiring to counsel, aid, and abet draft evasion.² Each of the defendants had a separate lawyer, but the lawyers worked closely together.

I was asked to represent one of the defendants. Because none of the facts establishing the offense were in dispute, and conviction was certain, I said I would do so only with the understanding that I would raise jury nullification in the trial. That is, I wanted to inform the jury that they had the power to acquit Spock and the others if the jurors believed that they should not be convicted as felons and punished for their conscientious opposition to this particular war.

Unfortunately, the lawyers who had already been retained had made a motion in limine,³ asking Trial Judge Francis Ford to allow them to inform the jury of their power of nullification.⁴ Judge Ford had not only refused, but had warned them that if they did so, he would hold them in

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1. United States v. Spock, 416 F.2d 165, 174 (1st Cir. 1969).

2. The prosecution was brought under § 12 of the Military Selective Service Act of 1967. 50 U.S.C. § 462 (2006); *Spock*, 416 F.2d at 168.

3. A motion in advance of trial.

4. See John H. Fenton, *Dr. Spock Guilty with Three Other Men in Antidraft Plot*, N.Y. TIMES, June 15, 1968, at A1; *Tough-Minded Judge: Francis Joseph William Ford*, N.Y. TIMES, June 15, 1968, at A2.

contempt. Accordingly, my participation was disapproved by the other lawyers, and the offer to retain me was withdrawn.

After Spock and three other defendants were convicted,⁵ he and several others involved in the trial met in the courthouse corridor with some of the jurors. One of the jurors said, “Dr. Spock, we want you to know that all of the jurors consider you to be a true American hero.” In response, one of the lawyers asked, “How then could you have convicted him?” Looking puzzled, the juror replied, “We had no choice. He did what the government said he did.”

What the jurors had not known is that they did have a choice, through the power of jury nullification.

II. A BRIEF HISTORY OF JURY NULLIFICATION⁶

Jury nullification has been traced to *Bushell’s Case*⁷ in England in 1670, although the phrase “jury nullification” was not used.⁸ William Pitt and William Mead were Quaker ministers who preached their faith publicly.⁹ Because England had established the Church of England as the official religion, Pitt and Mead were prosecuted for preaching to an unlawful assembly and for breach of the peace.¹⁰ The jury acquitted Mead of all charges and found Penn not guilty of disturbing the peace.¹¹ In order to coerce the jurors to find the defendants guilty, the judge deprived them of food, water, and heat.¹² When that failed, the judge fined the jurors, and when Edward Bushell and other jurors refused to pay the fine, the judge put them in prison.¹³ As the result of a habeas corpus proceeding brought by Bushell, he was released.¹⁴ The report of

5. One defendant had been only minimally involved, and was acquitted.

6. The sources of this discussion are too diverse, and go back too far in my experience, for adequate citations. However, I have relied heavily on the lengthy and scholarly opinions of Federal District Judge Jack B. Weinstein. See *United States v. Polouizzi*, 687 F. Supp. 2d 133, 135 (E.D.N.Y. 2010); *United States v. Polizzi*, 549 F. Supp. 2d 308, 317 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009); see also Ann M. Roan, *Saint Jude Is My Jury Consultant: Voir Dire to Win the Hopeless Case 5-8* (2011) (training monograph) (on file with the *Hofstra Law Review*).

7. *Bushell’s Case*, (1670) 124 Eng. Rep. 1006 (C.P.); Vaughan 135.

8. See 124 Eng. Rep. at 1006-18; Simon Stern, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1815-16, 1822-27 (2002).

9. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 912 (1994); Stern, *supra* note 8, at 1822.

10. 124 Eng. Rep. at 1006; Alschuler & Deiss, *supra* note 9, at 912.

11. 124 Eng. Rep. at 1007; Alschuler & Deiss, *supra* note 9, at 912; Stern, *supra* note 8, at 1822.

12. Stern, *supra* note 8, at 1822.

13. Alschuler & Deiss, *supra* note 9, at 912; Stern, *supra* note 8, at 1822-23.

14. RICHARD FREEMAN, *REPORTS OF CASES: ARGUED AND DETERMINED IN THE COURTS OF KING’S BENCH & COMMON PLEAS, FROM 1670 TO 1704*, at 1 (2d ed. 1826).

the case includes the note: “Agreeably to this decision, it is now settled, that . . . jurors are in no way questionable for their finding.”¹⁵

Thereafter, juries used nullification to avoid the extremely harsh penalties of serious offenses that had been proved, by finding the defendants guilty of lesser offenses.¹⁶ Blackstone characterized this practice of juries as “pious perjury.”¹⁷

Later, colonial juries nullified British law in prosecutions that the colonists considered to be unjust.¹⁸ For example, in 1735 John Peter Zenger was prosecuted for seditious libel for printing a journal that criticized the colonial governor of New York for crimes and other faults.¹⁹ The common law rule at the time was that “the greater the truth, the greater the libel,” so truth was not a defense to a charge of libel.²⁰ When Zenger’s first two lawyers were disbarred for zealously representing him, Zenger had to go out of the state for a lawyer and retained Andrew Hamilton of Philadelphia (no relation to Alexander Hamilton).²¹

Hamilton in effect admitted that Zenger had committed the facts constituting the offense.²² But, without using the phrase “jury nullification,” Hamilton argued to the jury that they had the power to decide the law as well as the facts, and that they should disregard the judge’s instructions and recognize truth as a defense.²³ The jury did so, and acquitted Zenger.²⁴

In 1895, however, the Supreme Court held in *Sparf v. United States*²⁵ that although jurors might have the power to nullify the law in rendering a general verdict, they can properly be kept ignorant of their power of nullification.²⁶

Sparf was a capital prosecution for murder.²⁷ The jury indicated to the judge that it was considering returning a verdict of manslaughter,

15. *Id.* at 5 n.h. One of the arguments on behalf of Bushell was that “The judges are to open the eyes of the jurors, but not to lead them by the nose.” *Id.* at 2.

16. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 57-58 (2003).

17. *United States v. Pollizi*, 549 F. Supp. 2d 308, 418-19 (2008); LANGBEIN, *supra* note 16, at 58 (citation omitted).

18. Alschuler & Deiss, *supra* note 9, at 874.

19. *Id.* at 871-72.

20. *Id.* at 873.

21. *Id.* at 872-74. The royalist press referred to Hamilton disparagingly as the “Philadelphia lawyer,” a term of derogation that is still used today. William Safire, *Philadelphia Lawyers*, N.Y. TIMES, Oct. 13, 1996, at SM 30.

22. Alschuler & Deiss, *supra* note 9, at 873.

23. *Id.*

24. *Id.*

25. 156 U.S. 51 (1895).

26. *Id.* at 98, 103.

27. *Id.* at 52.

which would have avoided the death penalty. The judge instructed the jury that they could find the defendant guilty of murder, or find him not guilty, but they could not convict the defendant of any lesser crime, such as manslaughter, because the evidence was logically inconsistent with such a finding.²⁸ The jury then returned a verdict of guilty of murder.²⁹

On the appeal in *Sparf*, the Supreme Court recognized that “[t]he language of some judges and statesmen in the early history of the country, impl[ie]d that the jury were entitled to disregard the law as expounded by the court.”³⁰ That language, the Court held, “is, perhaps, to be explained by the fact that ‘in many of the States the arbitrary temper of the colonial judges, holding office directly from the Crown, had made the independence of the jury in law as well as in fact of much popular importance.’”³¹

Nevertheless, the Court affirmed the conviction.³² Without using the phrase “jury nullification,” the Court rejected the argument that the trial court’s instruction had erroneously withheld from the jury its power to nullify the death sentence by finding a lesser offense.³³ “To instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offenses that might, under some circumstances, be included in the one so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offense charged—is not error,” the Court said, “for the instructing or refusing to instruct, under the circumstances named, rests upon legal principles . . . which it is the province of the court to declare for the guidance of the jury.”³⁴

Since the holding in *Sparf*, almost all federal trial judges have refused to instruct juries about nullification, and, whenever asked in a motion in limine, have ordered defense counsel not to raise the issue.³⁵

28. *Id.* at 62 n.1, 63-64.

29. *Id.* at 52.

30. *Id.* at 89.

31. *Id.* at 89-90 (quoting *Williams v. State*, 32 Miss. 389, 396 (1856)); FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING & PRACTICE 538 (8th ed. 1880).

32. *Sparf*, 156 U.S. at 106.

33. *Id.*

34. *Id.* at 103.

35. Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1621-22 (2001).

III. THE INTENT OF THE FRAMERS AND THE PROSPECT FOR JURY NULLIFICATION IN TODAY'S SUPREME COURT

A. *The Original Constitutional Intent Regarding Nullification*

As we have seen, even the Supreme Court in *Sparf* acknowledged that the constitutional guarantee of trial by jury was motivated by the “popular importance” of “the independence of the jury in law as well as in fact” at the time the Constitution was adopted.³⁶ References to trial by jury during that period, therefore, incorporated this understanding as an aspect of trial by jury.

In discussing the guarantee of trial by jury in criminal cases,³⁷ Alexander Hamilton wrote in THE FEDERALIST that both the friends and adversaries of the proposed Constitution concurred in “the value [that] they set upon the trial by jury.”³⁸ “Or,” he added, “if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”³⁹

Hamilton himself saw the jury as “a barrier to the tyranny of popular magistrates in a popular government,” preventing “arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions,” which are the “great engines of judicial despotism.”⁴⁰ That is, Hamilton recognized that the jury in a criminal case is a safeguard against “judicial despotism,” preventing both unjust convictions and unjust punishments.⁴¹

B. *Some Later Authorities*

Without overruling *Sparf* or using the phrase “jury nullification,” some later Supreme Court cases recognized that the jury’s purpose is to provide its “common-sense judgment,” which can be more sympathetic to the defendant than a “compliant, biased, or eccentric judge” might be,

36. *Sparf*, 156 U.S. at 89-90 (quoting *Williams*, 32 Miss. at 396); WHARTON, *supra* note 31, at 538.

37. “Trial of all Crimes . . . shall be by Jury.” U.S. CONST. art. III, § 2, cl. 3.

38. THE FEDERALIST NO. 83, at 327, 331 (Alexander Hamilton) [hereinafter THE FEDERALIST].

39. *Id.* at 331.

40. *Id.* at 332.

41. *Id.* Referring to THE FEDERALIST, Justice Antonin Scalia recently said: “Here is a document that says what the Framers of the Constitution thought they were doing.” *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Scalia, J.) [hereinafter *Considering the Role of Judges Under the Constitution of the United States*].

and can also serve as an “inestimable safeguard against the corrupt or overzealous prosecutor.”⁴² Also, the D.C. Circuit has noted that a defense lawyer may satisfy the requirement of competent representation, even while using a defense with little or no basis in the law, “if this constitutes a reasonable strategy of seeking jury nullification when no valid or practicable defense exists.”⁴³

In addition, in the *United States v. Spock*⁴⁴ case, the trial judge required the jurors to make specific findings of fact on each of the elements of the offenses charged, which led logically to a guilty verdict.⁴⁵ The judge thereby prevented the jury from returning a general verdict of not guilty, which could have been based on a purpose to nullify the prosecution.⁴⁶ On appeal, the First Circuit reversed, holding that “Uppermost . . . is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic. . . . The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.”⁴⁷ Accordingly, the defendants were entitled to a general verdict from the jury, rather than being restricted by a series of specific factual findings.⁴⁸

Moreover, Federal District Judge Jack Weinstein has shown that in recent years “[t]he Supreme Court has recognized that the jury has a significant role in determining punishment.”⁴⁹ These decisions, Weinstein noted, have reaffirmed three propositions that support entrusting jurors with knowledge of their power of nullification.⁵⁰ First, the fundamental right of jury trial “provides a check on the courts equivalent to that of the voter on elected officials.”⁵¹ Second, in interpreting the Sixth Amendment, the Court relies on criminal practice

42. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *see also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan*, 391 U.S. at 155-156) (adding a reference to the “overconditioned judge”).

43. *United States v. Sams*, No. 95-3152, 1996 U.S. App. LEXIS 41842, at *2 (D.C. Cir. Dec. 9, 1996).

44. 416 F.2d 165 (1st Cir. 1969).

45. *Id.* at 168, 181-83.

46. *Id.* at 181-83. The colonists “decided to rely solely on general verdicts in criminal cases and endowed juries with the power to determine not only the facts of a case, but also the law.” Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 102 (2006) (citing, *inter alia*, Edmund Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 590-91 (1922)).

47. *Spock*, 416 F.2d at 182.

48. *Id.* at 182-83.

49. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 183-87, 190, 208 (E.D.N.Y. 2010), *vacated*, 393 F. App’x 784 (2d Cir. 2010).

50. *Id.* at 183-84.

51. *Id.* at 184.

existing when the Constitution was adopted.⁵² Third, the Court is willing to overturn long-established holdings that are based on erroneous interpretations of the Constitution.⁵³

C. *Current Indications from the Supreme Court*⁵⁴

Illustrating Judge Weinstein’s analysis, the Supreme Court held in *Apprendi v. New Jersey*⁵⁵ that the right to trial by jury is meant to “guard against a spirit of oppression and tyranny on the part of rulers” and is “the great bulwark of [our] civil and political liberties.”⁵⁶ And in *Blakely v. Washington*,⁵⁷ the Court similarly recognized that the right to jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”⁵⁸

More recently, in a Senate Judiciary Committee hearing,⁵⁹ Justice Antonin Scalia explained that: “The jury is a check on us. It is a check on the judges. I think the framers were not willing to trust the judges to find the facts.”⁶⁰ Indeed, Scalia added, “when the Constitution was ratified, juries used to find not only the facts but the law. And this was a way of reducing the power of the judges to condemn somebody to prison.”⁶¹ Most significantly, Scalia went on to say, “[s]o it absolutely is a structural guarantee of the Constitution.”⁶² Justice Stephen Breyer agreed with Scalia: “Yes, I think it is very important. . . . [T]hey are not

52. *Id.*

53. *Id.*

54. In addition to Judge Weinstein’s analysis, see generally the excellent article by Chris Kemmitt, *supra* note 46 (relying in part on Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-86 (1991); Alschuler & Deiss, *supra* note 9; Mark DeWolfe Howe, *Juries as Judge of Criminal Law*, 52 HARV. L. REV. 582 (1939)). For a discussion on how the Supreme Court has considered the role of the jury, see Stern, *supra* note 8, at 1822-25.

55. 530 U.S. 466 (2000).

56. *Id.* at 477 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)) (internal quotation marks omitted).

57. 542 U.S. 296 (2004).

58. *Id.* at 305-06.

59. *Considering the Role of Judges Under the Constitution of the United States*, *supra* note 41, at 6.

60. *Id.* at 39.

61. *Id.*

62. *Id.* The phrase “structural guarantee” has particular significance. For example, in *United States v. Gonzalez-Lopez*, Scalia wrote for the Court that a “structural defect” in a trial requires preemptory reversal, without any showing of prejudice. 548 U.S. 140, 148-50, 152 (2006).

just a fact-finding machine.”⁶³ Rather, the jury is an “application of community power.”⁶⁴

Senator Sheldon Whitehouse then added: “I wonder if the stature of the jury in the architecture of American Government could not just be as a check on judges, but also as sort of the last bastion when somebody who is put upon or set upon by . . . political forces that most lend themselves to corruption,” such as elected officials.⁶⁵ Instead, they might get before a random group of their peers, creating not just a check on judges, but also “on all of us and the rest of the system of Government?”⁶⁶

Agreeing with Senator Whitehouse, Scalia responded: “Well, I think that is probably right And that makes them a check not just on the judges but, of course, on the legislature that enacted the law to apply in this particular situation.” And he added, significantly, “I am a big fan of the jury, and I think our Court is, too.”⁶⁷

Of course, it is pointless for a jury to have this fundamental power if it is kept in ignorance that it exists. There is reason for hope, therefore, that the Supreme Court would reverse a conviction in which a trial judge refused to inform the jury of its power of nullification or forbade a defense lawyer to do so.

IV. HOW TO ETHICALLY INFORM A JURY OF ITS POWER OF NULLIFICATION

A. *Cases in Which to Use Nullification*

As mentioned, jury nullification is most important in cases in which the evidence is overwhelming against the defendant.⁶⁸ Also, nullification depends upon the possibility of getting the jurors (or even just one juror)⁶⁹ to sympathize sufficiently with the defendant and with the defendant’s reason for having committed the crime.⁷⁰ Those cases

63. *Considering the Role of Judges Under the Constitution of the United States*, *supra* note 41, at 39.

64. *Id.*

65. *Id.* at 39-40.

66. *Id.* at 40.

67. *Id.*

68. *See supra* Parts II–III.

69. A single dissenting juror can prevent the unanimity required for conviction in a federal court. *See, e.g.,* *Andres v. United States*, 333 U.S. 740, 748 (1948) (stating that unanimity is required when the Sixth and Seventh Amendments are being used).

70. A lawyer who has specialized in capital murder cases commented to me, only partly ironically, that there are two issues in every such case—whether the victim deserved to die, and whether his client was the right person to do it. Similarly, when Percy Foreman was asked how it

include: conscientious anti-war activities; assisted suicide of a loved one who is terminally ill and in great pain; a spouse who has suffered years of brutality and kills the abuser; a defendant who is the victim of police abuse or of prosecutorial overreaching; use of medical marijuana; and a crime against an abortion provider.⁷¹

As the abortion example suggests, jury nullification knows no particular ideology.⁷² Just as free speech is sometimes used on behalf of “bad causes,” so will jury nullification. The most egregious examples of nullification have been when southern juries regularly acquitted plainly guilty perpetrators of lynchings of African-Americans.⁷³ In those cases, jury nullification did not have to be raised because nullification was commonplace.⁷⁴

Theories that might be used to provide a basis for nullification include: self-defense;⁷⁵ temporary insanity;⁷⁶ necessity;⁷⁷ justification;⁷⁸ entrapment;⁷⁹ lack of criminal intent;⁸⁰ selective prosecution;⁸¹ and reasonable doubt.⁸² Of course, in the contexts discussed here,

was someone could get years in prison for stealing a cow, but that Foreman had clients who got minimal punishments for killing someone, he replied, “There’s no cow that deserves to be stolen, but there are people who deserve to be killed.”

71. See, e.g., *United States v. Anderson*, 716 F.2d 446, 447-50 (7th Cir. 1983) (discussing jury nullification in a case in which the defendant had abducted the doctor who had given his wife an abortion); Andrew J. Parmenter, Note, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 389, 393-94, 425-26 (2007) (discussing jury nullification in anti-war activity, assisted suicide, police abuse, and medical marijuana cases); Dan Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*, N.Y. TIMES, Oct. 7, 2011, at A1 [hereinafter Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*] (discussing a murder case in which a woman who had murdered her abusive husband was acquitted).

72. See *Anderson*, 716 F.2d at 446, 447-50.

73. See Alschuler & Deiss, *supra* note 9, at 890-91.

74. *Id.*

75. See, e.g., Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1723-25 (1981) (discussing jury nullification in self-defense cases in which the offender had been the victim of domestic violence).

76. See, e.g., *Evers v. State*, 20 S.W. 744, 745-46 (Tex. Crim. App. 1892) (discussing the law on the effects of alcohol on temporary insanity pleas).

77. See, e.g., *In re Friedman*, 392 N.E.2d 1333, 1334-35 (Ill. 1979), discussed in MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 110 & n.288 (4th ed. 2010).

78. See Chaya Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 848-49 (1990).

79. See W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1057, 1095 (1996).

80. See Weinberg-Brodt, *supra* note 78, at 849.

81. See, e.g., FREEDMAN & SMITH, *supra* note 77, at 288-90 (discussing the virtually unregulated doctrine of selective prosecution).

82. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 469, 476-78 (2000) (explaining the importance of the reasonable doubt standard in the criminal system); Weinberg-Brodt, *supra* note 78, at 868-70 (discussing the differences between the jury-centered and defendant-centered viewpoints, and how juror’s doubts factor into nullification and the lack of a unanimity requirement).

none of these theories will be strong, and sometimes will be logically inappropriate.

B. When in the Trial to Raise Nullification

In view of the recent indications from the Supreme Court, one way to inform the jury of its power of nullification would be to make a motion in limine, citing the authorities, and requesting an instruction explaining the jury's power to acquit the defendant despite the facts proved in the trial.⁸³ However, as happened in *Spock* and other cases, the judge might deny the motion and warn counsel of a possible finding of contempt and disciplinary action if counsel were to inform the jury of its power.⁸⁴ Also, the defendant could then be convicted and might well be compelled to spend considerable time in prison during appeals. As an alternative, here is another way to inform the jury of its power of nullification, with a view to obtaining an acquittal or a hung jury.⁸⁵

Most important, counsel should avoid alerting either the judge or the prosecution of the intention to raise jury nullification, and should postpone doing so until closing argument. That means not making a motion in limine requesting permission to raise nullification. However, forgoing a motion in limine does not preclude selecting the jury, examining the defendant, presenting witnesses, and cross-examining prosecution witnesses in a way that makes nullification more likely. For example, Ann Roan, the State Training Director for the Colorado Public Defender's Office, has prepared a training monograph explaining techniques of jury selection to increase the likelihood of nullification in otherwise hopeless cases.⁸⁶

Also, in examining the defendant, it is standard practice to humanize the defendant in direct examination in order to help the jurors see the defendant as a fellow human being with whatever favorable characteristics that can be brought out.⁸⁷ Particularly in a nullification case, examination should include all the facts that would make the jurors

in state courts).

83. See *Blakely v. Washington*, 542 U.S. 296, 305-06, 313-14 (2004); *Apprendi*, 530 U.S. at 469, 476-78; Noah, *supra* note 35, at 1620-22.

84. See *supra* Part I; see also Noah, *supra* note 35, at 1621.

85. A hung jury could result in imprisonment pending a new trial, but this would take less time than the appeals process. Also, the prosecution might decide not to retry the defendant. See FREEDMAN & SMITH, *supra* note 77, at 288-89.

86. See generally Roan, *supra* note 6.

87. For example, the Supreme Court has held per curiam that counsel's failure to uncover and present any evidence of a defendant's mental impairment, his family background, or his military service, did not reflect reasonable professional judgment. *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009) (per curiam).

understand, and even sympathize with, the defendant's commission of the crime. Also, defense witnesses should be called who are able to corroborate the events that induced the defendant to commit the crime, and prosecution witnesses should be cross-examined, if possible, for the same purpose.

In a recent case in New York, for example, Barbara Sheehan killed her husband by shooting him eleven times with two guns, first as he was shaving and then as he lay unarmed, wounded, and screaming on the bathroom floor.⁸⁸ The jury of nine women and three men acquitted Ms. Sheehan of murder, but convicted her of unlawful possession of the second gun, which she had taken from her husband.⁸⁹

Ms. Sheehan's lawyer, Michael G. Dowd, introduced evidence from Ms. Sheehan and her grown children that her husband had brutalized her throughout the marriage by repeatedly beating her, putting a gun in her mouth, and throwing things at her, including a pot of scalding pasta sauce.⁹⁰ The jury forewoman explained to a reporter for the New York Times that the jurors had accepted Ms. Sheehan's claim of self-defense "because the family's accounts of chronic and vicious abuse had rung true."⁹¹ She added, "[w]e believed she was justified with all the things she went through over the years."⁹² Ms. Sheehan is free pending appeal.⁹³ A principal issue in the appeal will be the refusal of the trial judge to allow expert testimony on the Battered Spouse Syndrome, which explains that a history of domestic abuse can influence a woman's reasonable belief that she must act in self-defense under circumstances in which imminent abuse may not appear to be present.⁹⁴ Such testimony might influence a jury to use nullification in a case involving chronic abuse.

C. Raising Nullification in Closing Argument

Not uncommonly, closing argument by the defense begins by reminding the jury of its unique function in the administration of justice.

88. Dan Bilefsky, *Five-Year Term for Woman Who Killed Her Husband*, N.Y. TIMES, Nov. 11, 2011, at A26 [hereinafter Bilefsky, *Five-Year Term*]; Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*, *supra* note 71.

89. Bilefsky, *Five-Year Term*, *supra* note 88; Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*, *supra* note 71.

90. Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*, *supra* note 71; Tanya Brannan, *In Defense of Barbara Sheehan: When a Battered Woman Kills*, PURPLE BERETS (Sept. 2011), http://www.purpleberets.org/barbarasheehan_trial.html.

91. Bilefsky, *Wife Who Fired Eleven Shots Is Acquitted of Murder*, *supra* note 71.

92. *Id.*

93. Bilefsky, *Five-Year Term*, *supra* note 88.

94. See BLACK'S LAW DICTIONARY 172-73 (9th ed. 2009).

In a case of jury nullification, that will have a particular emphasis. Note, though, that the phrase “jury nullification” need not be used. One reason is that the phrase in itself is not likely to have any meaning to the jurors. Also, for defense counsel to use the words “jury nullification” would likely result in a prosecution objection during the closing arguments, and would anger the judge.⁹⁵

In *Spock*, for example, the argument (abbreviated here) would include the following, much of it standard in closing arguments.

* * * * *

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.⁹⁶

95. We could call it the power that need not speak its name.

96. The Supreme Court has held that juries should reach their verdicts “without regard to *what sentence* might be imposed,” and should not be “provid[ed] . . . *sentencing information*.” *Shannon v. United States*, 512 U.S. 573, 579 (1994) (emphasis added). However, this does not mean that a reference to punishment, without any specific sentencing information, is improper. In order to avoid the interruption of an objection, however, counsel might prefer to omit the word punishment

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.⁹⁷

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.

* * * * *

Nothing in that closing argument is unethical, because it relies entirely on well-established authority in the Supreme Court and on statements by Justices Scalia and Breyer in testimony before the Senate Judiciary Committee.⁹⁸

V. CONCLUSION

The Framers of the Constitution understood that the right to trial by jury includes the jury's power to prevent unjust convictions and unjust punishments through jury nullification.⁹⁹ A century later in *Sparf*, the Supreme Court acknowledged the original intent regarding nullification.¹⁰⁰ Nevertheless, the Court held in *Sparf* that a jury can properly be kept ignorant of its power of nullification, a course that undermines the original intent recognizing nullification as an essential aspect of trial by jury.¹⁰¹ Since *Sparf*, virtually all trial judges have refused to inform juries about their power of nullification and, when asked in a motion in limine, they forbid counsel to raise the issue.¹⁰²

Despite *Sparf*, the current Supreme Court has reaffirmed three propositions that might justify entrusting jurors with knowledge of their power of nullification. First, the fundamental right of jury trial “provides a check on the courts equivalent to that of the voter on elected officials.”¹⁰³ Second, in interpreting the Sixth Amendment, the Court relies on criminal practice existing when the

and say instead, “branded as a criminal.”

97. *Id.*

98. *Considering the Role of Judges Under the Constitution of the United States*, *supra* note 41, at 39-40.

99. THE FEDERALIST, *supra* note 38, at 331-32.

100. *Sparf v. United States*, 156 U.S. 51, 103-07 (1895).

101. *Id.* at 83-90.

102. Noah, *supra* note 35, at 1621-22.

103. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 184 (E.D.N.Y. 2010); *see supra* Part III.C.

Constitution was adopted.¹⁰⁴ Third, the Court is willing to overturn long-established holdings that are based on erroneous interpretations of the Constitution.¹⁰⁵

However, there is no need for counsel to rely on inferences from recent Supreme Court decisions that jurors should be informed of nullification. Counsel can ethically inform the jury of its power of nullification by using the tactics, including the closing argument, described in Part IV above.¹⁰⁶ Nothing in that closing argument is unethical, because it relies entirely on well-established authority in the Supreme Court and on statements by Justices Scalia and Breyer in testimony before the Senate Judiciary Committee.¹⁰⁷

104. *Polouizzi*, 687 F. Supp. 2d at 184.

105. *Id.*

106. *See supra* Part IV.

107. *Considering the Role of Judges Under the Constitution of the United States*, *supra* note 41, at 39-40; *see supra* Part IV.C.