1995 WL 637915 (O.J.Comm.)
(Cite as: 1995 WL 637915 (O.J.Comm.))

O.J. Simpson Commentaries

***1** THE CAT'S OUT OF THE BAG: PROSPECTIVE JURORS MAY NOW KNOW ABOUT THEIR POWER TO NULLIFY

Norman M. Garland [FNa]

November 1, 1995

Note: This paper was originally presented at an MCLE Program at Southwestern University School of Law on October 29, 1995

As the title suggests, there is a principle of American trial jurisprudence known as jury nullification. It exists. It is real. It is proper. And heretofore sitting jurors have been uninformed about this power. At least a jury's power to nullify has been unspoken and thus presumed to be unknown. The courts in California have consistently held that the jury should not be informed of its power to nullify. However, there are many instances where Anglo-American juries have clearly engaged in jury nullification. And recently, even before the O.J. Simpson trial, the word has been passed to prospective jurors in criminal cases that they have the power to do whatever they want.

WHAT IS JURY NULLIFICATION?

Jury nullification is the power of a sitting jury in a criminal case to reach any verdict it wishes based on anything or nothing at all. This de facto power of a jury exists because of the concurrence of two basic tenets of, or procedures in, American jury trials: the finality of a jury acquittal in a criminal case (the prosecution cannot appeal/double jeopardy) and the use of the general verdict (the jury only answers the question, guilty or not guilty?).

Some people argue that the only true and proper jury nullification is when a jury decides that the law is bad; that it is not proper jury nullification when a jury disregards the facts in the case and refuses to convict a guilty accused. According to this view, it would be improper for the jury to find a defendant in a murder trial not guilty because of some sympathy for the accused or, as in the trial of O.J. Simpson, because of police mistreatment of Afro- Americans in the past.

This view is itself a product of misperception of the reality of the jury's power to nullify. The power is de facto and is unlimited. Even the earliest

disputes over the existence of the power arose in cases where the question of law versus fact was pressed by the critics of the nullification power. The true issues relating to the jury's power to nullify are whether and how the jury should be told of their power.

TO TELL OR NOT TO TELL: RIGHT v. POWER

The only major decision of the United States Supreme Court on the issue of whether the jury has the right to nullify is Sparf and Hansen v. United States, 156 U.S. 51 (1895). In that case the Court declared that although the jury has the power to disregard the law, it does not have the right to do so and therefore the jury need not and should not be told of their power. The Court has never directly addressed the issue of jury power to nullify since Sparf. Thus the Court declared the de facto power of a jury to nullify could not be acknowledged de jure.

However, there are some deficiencies with the proposition that Sparf should be taken as the last word on the subject. First, Sparf was a case in which the appeal of possible nullification is not very appealing. The defendants there were charged with murder on the high seas, a federal crime. The dispute centered on the question whether the jury should have been informed that they could have returned a verdict of manslaughter rather than murder even if there was no evidence in support of such a lesser offense verdict. The jury had asked the trial judge for clarification about the possibility of such a verdict and the judge had hedged his language, implying that if the jury did not follow the law there was nothing he could do about it. In the end, however, the jury made clear that they thought they had no power to do anything but find the accused guilty of murder or not guilty of murder. The Supreme Court declared that in fact there would have been no error if the trial judge had taken the manslaughter alternative from the jury in no uncertain terms, since there was no evidence whatsoever to support a jury verdict of manslaughter. In so declaring, the Court acknowledged the jury's raw power to disregard the law, but stated:

***2** "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; for the instructing or refusing to instruct, under the circumstances named, rests upon legal principles or presumptions which it is the province of the court to declare for the guidance of the jury." In short, the Court did not purport to deny the jury's nullification power or the issue whether to tell them about it in the context of a case involving a claim that the law itself is not worthy of enforcement.

The basis of the Court's decision in Sparf was that if jurors could disregard the law at whim, there would be no continuity to the law, and ultimately the very fabric of government would be threatened. Nonetheless, the basis of the decision also rested upon assertions of law which are no longer valid. For

example, the Court said: "Under a given state of facts, outlined in an instruction to the jury, certain legal presumptions may arise. May not the court tell the jury what those presumptions are, and should not the jury assume that they are told truly?" And, of course the implication of the rhetorical question is that the power to instruct as to presumptions in criminal cases is absolute. However, the Supreme Court has since declared, in In Re Winship, that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." Then, in Sandstrom v. Montana, the Court held that the jury instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated the principles of due process under the principles of Winship, since the jury might have understood the instruction either as establishing a conclusive presumption or shifting the burden of persuasion to the defendant.

In any event, throughout the twentieth century there have been recurring cases in which juries have nullified and surely in some of them lawyers have gotten the message to the jury one way or another.

THE JURY AS THE VOICE OF THE CONSCIENCE OF THE COMMUNITY (AND, BY THE WAY "SEND A MESSAGE")

Johnny Cochran made this appeal to the jury in his final summation:

". . . . That's why we love what we do, an opportunity to come before people from the community, the consciences of the community. You are the consciences of this community. You set the standards. You tell us what's right and wrong. You set the standards. You use your common sense to do that.

Your verdict goes far beyond these doors of this courtroom. As Mr. Darden said, the whole world is watching and waiting for your decision in this case. That's not to put any pressure on you, just tell you what's really happening out there." And, a little later, after arguing the lawlessness of Detectives Vanatter and Furman, he added:

***3** "So when they take the law into their own hands, they become worse than the people who break the law because they are the protectors of the law. Who, then, polices the police? You police the police. You police them by your verdict. You are the ones who send the message.

Nobody else is going to do it in this society. They don't have the courage. Nobody has the courage. You have a bunch of people running around with no courage to do what is right except individual citizens." This, among other language, was viewed as a vieled appeal to the jury to nullify. The quoted language was preceded by a systematic, if not tedious, review of the evidence and was part of a very specific argument tied to that evidence. Nonetheless, it is interesting that the argument that the jury is the voice of the conscience of the community is viewed as a legitimate argument more often than not, and is usually made by the prosecution and is widely permitted. Another dimension of that argument is to ask the jury to send a message as the voice of the conscience of the community. This too has typically been a prosecution argument and has been widely allowed. Curiously, a different rule exists in the District

of Columbia, where the Court of Appeals recently held:
"This court has stated repeatedly that an attorney must not ask a jury to 'send a message' to anyone, and we now expressly hold that urging the jury to 'tell' someone something is likewise improper, and for the same reason. Juries are not in the message-sending business. Their sole duty is to return a verdict based on the facts before them. Urging a jury to 'send a message' is impermissible because it implies that there is a reason to find the defendant guilty other than what the evidence has shown." It is interesting that when the defense used this argument in the O.J. Simpson trial the criticism was widespread and based on assumed appeal to the jury to nullify.

CURRENT STATUS OF THE JURY'S RIGHT TO KNOW

The requirement that jurors be informed of their power to nullify is constitutionally required in at least two states, Maryland and Indiana. Interestingly, in those states the jury are told of the power they have in an instruction which reads:
"Members of the jury: this is a criminal case and under the constitution and laws of the state of Maryland in a criminal case the jury are the judges of law as well as the facts in the case. So that whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And you may apply the law as you apprehend it to be in the case." The effect of this instruction is that the jury does not realize it has the power to nullify.
During the past few years, the Fully Informed Jury Association has had some impact and a number of state legislatures have passed or are considering legislation which would inform juries of their power to judge the law as well as the facts. The states of Arizona, Connecticut, Georgia, Massachusetts, Montana, New York, Oklahoma, Texas, and Washington all have such legislation pending.

FNa. Professor of Law, Southwestern University School of Law.

West's Topic and Key Number References

110 CRIMINAL LAW
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 k. In general.

110 CRIMINAL LAW
110XX Trial
110XX(F) Province of Court and Jury in General
110k731 k. Functions as judges of law and facts in general.

110 CRIMINAL LAW

110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k768 Instructions as to Duties of Jury
110k768(1) k. In general.
1995 WL 637915 (O.J.Comm.)
END OF DOCUMENT