NOT JURY NULLIFICATION; NOT A CALL FOR ETHICAL REFORM; BUT RATHER A CASE FOR JUDICIAL CONTROL

JUSTICE REBECCA LOVE KOURLIS*

Professor W. William Hodes posits that jury nullification is a time-honored American tradition; that criminal defense attorneys not only routinely argue jury nullification in defense of their clients but may do so ethically; and lastly, that the Simpson attorneys laced the theme of jury nullification throughout their defense, particularly in their closing argument.[1] I disagree with all three theses.

In response, I must first state that I find jury nullification akin to anarchy. Under its auspices, twelve people become self-appointed legislators, changing the law to fit the circumstances of a particular crime or a particular political climate. It is intolerable in an ordered society. Further, clear ethical standards and caselaw prohibit a criminal defense attorney from urging a jury to disregard the law, and, ultimately, it is the responsibility of the presiding judge to intervene to prevent such an overt or covert argument. Finally, it is my thesis that Johnnie Cochran flirted with jury nullification in his closing argument in the O.J. Simpson case, but considerably less so than the press or Professor Hodes has inferred.

I. HISTORY OF JURY NULLIFICATION

Jury nullification occurs when a jury concludes that a defendant actually committed the offense charged, but refuses to convict due to the jury's disavowal of the law[2] under which the

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* Justice, Supreme Court of Colorado. I would like to thank my law clerk, Kami Pomerantz, for her assistance with this essay.

1. Professor Hodes delineates three kinds or forms of jury nullification. W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1088-1097 (1996). However, because each form equally undermines the judicial system and it is impossible to know which form a jury has undertaken in any specific case in order to make a normative judgment, I find the encouragement of any form of jury nullification unethical and unjust.

2. Professor Hodes suggests that a jury may acquit an otherwise guilty defendant not because the jury disagrees with the law but rather to send some message. Ultimately, this is a disavowal of the law and of the jury's role within the

defendant is charged. Jury nullification is a direct violation of the jurors' oath, by which all jurors swear to "render a true verdict according to the evidence."[3]

Jury nullification is not a modern phenomenon. It can be traced to the English common and medieval law.[4] As early as 1670, William Penn and William Mead were acquitted of charges of seditious libel by a rebellious jury that was proceeding contrary to the trial judge's direction.[5]

In our country, the trial of John Peter Zenger is a celebrated example of jury nullification. Zenger was acquitted of seditious libel against the English crown on the basis of Andrew Hamilton's passionate plea to the jury both to "expose and oppose arbitrary power" and to "overturn tyranny by rendering an impartial and uncorrupt verdict."[6] In other words, Hamilton asked the jury to disregard the law because it was unjust. The jury complied.

In *Sparf & Hanson v. United States*,[7] the United States Supreme Court specifically rejected the notion that juries have a right to disregard the law and nullify a conviction. The Court explained that the law was the province of the judge and the facts the province of the jury. Federal circuit courts have followed suit and rejected the argument that defendants are entitled to a jury nullification instruction.[8] In *Strickland v. Washington*,[9] the Court noted, albeit in dicta, that "[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like."[10]

We must remember also, as we examine jury nullification, that it can be used not only for heroic causes, such as that of John Peter Zenger, but also for base causes, such as the protection of

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judicial system. Thus, I disagree with Professor Hodes's statement that any doubts as to the wisdom of allowing jury nullification of the first kind are lessened with respect to jury nullification of the second and third kinds. Hodes, *supra* note 1, at 1091.

3. COLO. JURY INSTRUCTIONS-CRIM. 1:08 (1983).

4. Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 829 (1990).

5. *Id.*

6. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 78, 99 (Stanley N. Katz ed., 1963).

7. 156 U.S. 51 (1895).

8. *See* United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988).

9. 466 U.S. 688 (1984).

10. *Id.* at 695.

segregationists who attacked civil rights workers in the 1960s.[11] Clearly one problem with jury nullification is that the determination of which laws are unjust is entirely dependent on an individual's point of view. By allowing or encouraging juries to follow their individual consciences to determine which laws are unjust, we are enabling the views of a very small minority, for better or worse, to become the law.[12]

Various states have wrestled with the propriety of instructing the jury on nullification. Two states retain laws that permit the jury to evaluate the law as well as the facts of the case, although even those laws are carefully circumscribed. The Indiana Constitution provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."[13] The related jury instruction directs the jury as follows:

> The constitution of this state makes the juries the judges of the law and the facts. But this does not mean that jurors may willfully and arbitrarily disregard the laws; or that they may make or judge the law as they think it should be in any particular case .... [Jurors] shall so judge the laws as to give them a fair and honest interpretation to the end that each and every law in the case may be fairly and honestly enforced.[14]

Maryland's constitutional provision and jury instruction are similar to those of Indiana.[15] Yet, though Indiana and Maryland are cited as approving of jury nullification, the very language of the instruction takes away what it purports to give: the power to nullify laws.

The fundamental issue that jury nullification raises is who should be empowered to change the law. Is it healthy in a democratic society for a twelve person minority to decide a law is

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11. Joseph L. Galiber et al., *Law, Justice and Jury Nullification: A Debate*, 28 CRIM L. BULL. 40, 44 (1992).

12. Professor Hodes states that he is disturbed by my condemnation of jury nullification because he is troubled by the suggestion that "I or anyone else [could be] empowered to 'rule' authoritatively on which instances of jury nullification are 'proper' and which are not." Hodes, *supra* note 1, at 1090. However, I disagree with all forms of jury nullification because each at base diverts the verdict away from the guilt or innocence of an individual to broader moral questions facing society. I believe the forum for addressing these greater moral issues in a democratic society is at the polls and not in the jury box.

13. IND. CONST. art. I, § 19.

14. *Id.* at 47-48.

15. *See* MD. DECLARATION OF RIGHTS, art. 23.

unjust, disregard it, and then substitute its own understanding of what is just for that of a democratically elected legislature? Allowing juries such power leads to anarchy. It establishes a system of justice where the fate of both society and a defendant is left to the arbitrary and capricious notions of at most twelve individuals. Allowing the jury full rein would provide our judicial system with little consistency in verdicts and little faith that the law is being applied equally and dispassionately to all. Our representative form of government dictates that laws should be changed through the democratic process, not at the whim of a jury.

Jury nullification may well be the outgrowth of schisms in society itself. Certainly the acquittals of William Penn and John Peter Zenger represented a quiet rebellion against what was perceived to be an anarchical government. The less commendable examples of jury nullification, such as the refusal to convict those who had attacked civil rights workers, also represent a minority faction's refusal to follow the laws enacted by the majority. Hence, the impetus for jury nullification lies in the unwillingness of a minority group to accept the laws as written: the verdict may be directed toward a condition in society, rather than toward an adjudication of the facts. Perhaps the real goal, in order to avoid eruptions of jury nullification, ought to be "to discover the cement to bond the heterogeneous strains into one nation, one polity, one civilization."[16]

II. AN ETHICAL CRIMINAL DEFENSE ATTORNEY MAY NOT ARGUE FOR JURY NULLIFICATION

The *American Bar Association Standards for Criminal Justice* provide:

> (a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

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16. *See* Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 248 n.43 (1992) (quoting Leslie Gordon Fagen, *Preface* to SIMON RIFKIND AT 90, ON THE 90S at iii (1992) (quoting Judge Rifkind)).

> (b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
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> (c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.
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> (d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.[17]

The commentary to the standard clarifies that a lawyer may not appeal to the prejudices of the jury, unless prejudice is itself an issue in the case; and that lawyers should not make arguments that encourage the jury to depart from its duty to decide the case on the evidence and the inferences reasonably derived therefrom.[18]

The *American Bar Association Model Code of Professional Responsibility* directs that a lawyer appearing before a tribunal shall not

> [a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on the analysis of the evidence, for any position or conclusion with respect to the matters stated herein.[19]

When prosecutors violate those mandates, the appellate courts do not take it lightly. For instance, in *Harris v. People*,[20] the Colorado Supreme Court reversed a conviction and ordered a new trial because on the eve of the Gulf War the prosecutor compared the defendant's alleged acts of violence to those of Saddam Hussein. The Court quoted the ABA Standards with

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17. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-7.7 (3d ed. 1993).

18. *Id.* § 4-7.7 commentary. It should be noted that the commentary to ABA Standard § 4-7.7 provides that the defense may argue "jury nullification" in jurisdictions permitting such argument—presumably referring to Indiana and Maryland.

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(4) (1981).

20. 888 P.2d 259 (Colo. 1995).

approval and concluded that the references to Saddam Hussein were "improper encouragement to the jurors to employ their patriotic passions in evaluating the evidence."[21]

The United States Supreme Court noted, in *United States v. Young*,[22] that defense counsel are subject to the same constraints in the scope of their argument to the jury as are prosecutors. In *State v. Bennefield*,[23] the Delaware Supreme Court echoed the principle that defense and prosecution alike are subject to ethical constraints in argument, and concluded that a defense attorney's characterization of State witnesses as "scum", "liars", "snakes" and "scoundrels" was improper.

Asking a jury to ignore the law and acquit a defendant who would otherwise be found guilty on the facts and law of the case is not a proper request for a defense attorney to make. The question, then, is whether that is what Johnnie Cochran did in his closing argument appeal to the Simpson jury.

III. THE COCHRAN CLOSING ARGUMENT

As we focus our analysis on the Simpson case itself, let me first urge us to restrict our opinions to the language that was used in the trial and avoid forming impressions based upon media accounts. Some commentators have contended that Cochran's closing argument was a call for jury nullification;[24] others have suggested that he was playing the "race card."[25] Let us form our own conclusions.

First, we can all certainly agree that it is both proper and imperative for a defense attorney to argue that the prosecution has not proven its case beyond a reasonable doubt. It is also clearly permissible to argue that the prosecution witnesses are not credible and that their testimony is not to be believed.

Cochran's closing argument had three main themes: (1) the evidence was insufficient to support a verdict of guilt (for example, the glove did not fit); (2) the police were biased, sinister, and therefore not credible; and (3) the police felt they were above

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21. *Id.* at 265.
22. 470 U.S. 1 (1984).
23. 567 A.2d 863 (Del. 1989).
24. William Raspberry, *Reasonable Doubt Not Unreasonable*, THE DETROIT NEWS, Oct. 11, 1995, at A9.
25. *See* Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 55, 56.

the law and the jury should punish them for that arrogance by returning an acquittal.

Can any of those arguments truly be characterized as a plea for jury nullification? If Cochran had been arguing jury nullification in a classic sense, he would have inferred that Simpson was guilty but that murder laws should not be applied to African American men in Los Angeles, or that murder laws should not be applied to O.J. Simpson. Of the three themes, the only one that comes close to suggesting jury nullification is the third.[26] Let us examine the language that Cochran used in his closing argument as it related to this theme to determine if he was urging the jury to overturn the law.

Cochran opened by saying that the case "talks about justice in America and it talks about the police and whether they're above the law and it looks at the police perhaps as though they haven't been looked at very recently. Remember, I told you this is not for the naive, the faint of heart or the timid."[27] He continued:

> That's what this case is all about, not following the rules.[28]
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> . . . .
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> So this is not for the faint of heart. This is not for the timid. As I said, this is for the courageous who understand what the Constitution is all about.[29]
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> . . . .
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> It all comes back to Fuhrman when he says in that letter, "If I see an interracial couple, I'll stop them. If I don't have a reason, I'll make up a reason." This man thinks he's above the law.[30]
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> . . . .
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> This whole thing about the police and what they've done in this case is extremely painful to us and I think to all right-thinking

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26. Professor Hodes suggests that Cochran successfully induced the jurors to engage in jury nullification of the "third kind"—to send a message presumably to the Los Angeles Police Department. Hodes, *supra* note 1, at 1080-81, 1098-1100. Although Cochran's rhetoric could be understood in this manner, alternatively, Cochran could have meant only to criticize the investigatory tactics of the police in an effort to question their credibility. Understood in this way, Cochran's argument comports with acceptable ethical standards.

27. Official Transcript, Defense Closing Argument, People v. Simpson, No. BA 097211, 1995 WL 686429, at *10 (Cal. Super. Ct. L.A. County Sept. 27, 1995) (statements of defense attorney Johnnie Cochran).

28. *Id.* at *59.

29. *Id.* at *61.

30. *Id.* at *71.

citizens because you see, we live in Los Angeles and we love this place. But all we want is a good and honest police force where people are treated fairly no matter what part of the city they're in. That's all you want. So in talking to you about this, understand, there is no personal pride. But I told you when we started, this is not for the weak or the faint of heart.[31]

. . . .

Then we come, before we end the day, to Detective Mark Fuhrman. This man is an unspeakable disgrace. He's been unmasked for the whole world for what he is, and that's hopefully positive. His misdeeds go far beyond this case because he speaks of culture that's not tolerable in America.[32]

. . . .

You are the consciences of the community. You set the standards. You tell us what is right and wrong. You set the standards. You use your common sense to do that.[33]

. . . .

There is something about corruption. There is something about a rotten apple that will ultimately infect the entire barrel, because if the others don't have the courage that we have asked you to have in this case, people sit sadly by.[34]

. . . .

Stand up, show some integrity.[35]

. . . .

And so Fuhrman, Fuhrman wants to take all black people now and burn them or bomb them. That is genocidal racism. Is that ethnic purity? What is that?[36]

. . . .

But you and I, fighting for freedom and ideals and for justice for all, must continue to fight to expose hate and genocidal racism and these tendencies.

We then become the guardians of the Constitution, as I told you yesterday, for if we as the people don't continue to hold a mirror up to the face of America and say this is what you promised, this is what you delivered, if you don't speak out, if you don't stand up, if you don't do what's right, this kind of conduct will continue on forever and we will never have an

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31. *Id.* at *73.

32. *Id.* at *75.

33. Official Transcript, Defense Closing Argument, People v. Simpson, No. BA 097211, 1995 WL 697928, at *2 (Cal. Super. Ct. L.A. County Sept. 28, 1995) (statements of defense attorney Johnnie Cochran).

34. *Id.* at *8.

35. *Id.* at *11.

36. *Id.* at *13.

> ideal society, one that lives out the true meaning of the creed of the Constitution or of life, liberty and justice for all.[37]

Is this jury nullification? I do not think so. Cochran is not arguing that O.J. Simpson *should* be above the law; he is arguing that the Los Angeles Police Department *should not* be above the law. He is not arguing that the law is inappropriate or unfair; he is arguing that the conduct of the police was racist and unfair. He is not Andrew Hamilton suggesting to a jury that even though Zenger might be guilty as charged, the law itself should not be upheld. Rather, he is arguing that justice required the acquittal of O.J. Simpson because the Los Angeles Police Department so tainted the evidence through word or deed that it was not credible.

Because Cochran's main arguments were based on assessing the credibility and reliability of the evidence, I do not believe Cochran stepped over the bounds of ethics to argue jury nullification.

IV. ETHICAL VIOLATIONS IN GENERAL, AND A SOLUTION

To return to our original theme, Professor Hodes and I were directed to address ethical violations of the lawyers in the Simpson trial and proposed reforms designed to redress those violations.

Although I conclude that jury nullification was not one of the transgressions of the Simpson defense team, that does not amount to a blanket vote of approval. I do believe that both the defense and prosecution committed ethical violations during the course of the trial and that the solution lies not so much in reform but in control.

A. Media Relations

When the Simpson case began, the *California Rules of Professional Conduct* did not prohibit the attorneys from discussing the case with the media. In October 1995, the California Supreme Court adopted Rule of Professional Conduct 5-120,[38] which proscribes lawyer statements that are likely to materially

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37. *Id.* at *16.

38. *See* Ca. Order 95-57, 1995 Cal. Legis. Serv. 9 (West 1995).

prejudice a criminal or civil jury trial. Hence, during most of the Simpson trial, no ethical constraint circumscribed the lawyers' comments to the media; that has now changed. If the Rule had been in effect from the beginning of the trial, the media coverage outside the courtroom would have been altered. A problem was addressed and a solution adopted.

B. Closing Argument Violations

Cochran committed three persistent violations of ABA Standard 4-7.7 during the course of his closing argument.[39] The first was his personal association with the jury. Repeatedly, he spoke to the jury in terms of "we." For instance, "we live in Los Angeles and we love this place. But all we want is a good and honest police force . . . ."[40] Or, "But you and I, fighting for freedom and ideals and for justice for all, must continue to fight to expose hate and genocidal racism and these tendencies. We then become the guardians of the Constitution . . . ."[41] Just as Cochran placed himself on the ledger in the jury's column, so too, he placed the prosecution on Fuhrman's side. He did not just attack Fuhrman's credibility, he attacked the credibility of the prosecution. He inferred that not just Fuhrman but the prosecution itself was sinful and malicious.

Similarly, Cochran expressed his personal opinions about the credibility of witnesses. The most egregious example was the comparison of Fuhrman to Adolf Hitler. Cochran was injecting his personal beliefs into his argument in an overt manner, in violation of the *California Rules of Professional Conduct.*

The last violation is a more nebulous one and is the area in which Professor Hodes argues that Cochran spilled over into jury nullification. I view it differently. Cochran inappropriately appealed to the sympathies and biases of the jury by asking them to identify with Simpson as an African American man in a racist society. He did not cleave entirely to the evidence but rather drew broad inferences about the racist police conduct and the

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39. *See also* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-200 (1989).

40. Official Transcript, Defense Closing Argument, People v. Simpson, No. BA 097211, 1995 WL 686429, at *73 (Cal. Super. Ct. L.A. County Sept. 27, 1995) (statements of defense attorney Johnnie Cochran).

41. Official Transcript, Defense Closing Argument, People v. Simpson, No. BA 097211, 1995 WL 697928, at *16 (Cal. Super. Ct. L.A. County Sept. 28, 1995) (statements of defense attorney Johnnie Cochran).

duty of the jurors to punish that conduct. That, too, was technically a violation of the ethical standards.[42]

C. *The Solution*

In each instance, the conduct of the attorneys that I identify as inappropriate is already the subject of an ethical rule. Hence, reform in the area of ethical mandates for attorneys would not appear to be the answer to the problem.

Rather, the solution lies in stricter judicial enforcement of the existing standards. The United States Supreme Court has stated that "the judge is not the mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct."[43] Canon 3 of the Code of Judicial Conduct directs a judge to maintain order and decorum in the courtroom; to require the lawyers to be patient, dignified, and courteous to all participants; and to dispose promptly of the business of the court.[44]

In short, the judge charged with presiding over a trial has a superseding responsibility to assure that it is conducted appropriately and that the lawyers comport with their ethical mandates. The prosecution did not object to the statements made by Cochran during his closing argument that I have identified as questionable. They may have had their own reasons for choosing not to interrupt; however, that does not permit the judge to sit idly by. In my view, Judge Ito did not take the authoritative role that the law and the Code of Judicial Conduct requires of him in conducting the Simpson trial. He permitted the lawyers to set the pace, the tempo, and the tenor of the proceedings. With due regard for the danger of armchair judging, I am compelled to assign fault to Judge Ito for overlooking the transgressions of the attorneys during the course of the trial. He did not set and enforce time limits; and he rarely exercised independent discretion to control the scope and tenor of the proceedings.

Hence, if reform is our subject today, I must advocate a path of increased judicial control over courtroom proceedings. I hasten to add that the Simpson trial was not a truly representative example of the hundreds or thousands of trials that take place around the country daily; however, the problems it highlighted

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42. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-200 (1989).
43. Quercia v. United States, 289 U.S. 466, 469 (1933).
44. *See also* CALIFORNIA CODE OF JUDICIAL ETHICS Canon 3 commentary (1996).

are most probably present to some lesser extent in those trials. The judge should be in charge of the courtroom, not in an authoritarian or rude manner but in a firm, fair manner. Ultimately, it is the judge and only the judge who has responsibility for assuring that the trial is conducted fairly, effectively, and efficiently.

I conclude by restating an absolute opposition to jury nullification of existing laws and a belief that no attorney may ethically argue for nullification. The abuses of the Simpson trial may have culminated in a questionable verdict, but they most certainly originated from a societal schism that all citizens must heed and heal. Racism was the undercurrent sweeping the shores of the Simpson trial from beginning to end. Stricter judicial control of courtroom proceedings is certainly only one answer to the forces that surfaced in that courtroom. The broader answer is to work to achieve a system truly characterized by justice for all.