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The Elephant in the Room: Attorney Accountability for Jury Nullification Arguments in Criminal Trials

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COMMENT

THE ELEPHANT IN THE ROOM: ATTORNEY ACCOUNTABILITY FOR JURY NULLIFICATION ARGUMENTS IN CRIMINAL TRIALS

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INTRODUCTION

It was a simple case.[1] During a search incident to arrest for an unrelated parole violation, the arresting officer found a wrapped

1. This comment was inspired by watching a jury trial during my first internship as a law student in which defense counsel argued for jury nullification.

substance on the arrestee that field-tested positive for heroin. The arrestee was subsequently charged with misconduct involving a controlled substance.[2] The substance found looked like heroin and smelled like heroin, and the crime lab confirmed the substance was, in fact, heroin. However, when the defendant's attorney stood up to give his closing argument, he did not talk about the law, the prosecution's burden of proof, nor the presumption of innocence. Instead, he talked about growing up in a small southern town and going to the fair with his dad. He recalled seeing a large elephant loosely tied to a small stake.

The assistant district attorney objected, knowing the story and the metaphor it represented, as this was not the first time the defense attorney had tried to use this closing argument. The prosecutor knew the attorney was going to tell the jurors that they were in the same position as the elephant. Just as the elephant was strong enough to pull up the stake, the jury was strong enough to reject the law and not be held down by the jury instructions. The jurors had the ultimate power to acquit, regardless of the evidence. The defense attorney wanted the jurors to ignore their oaths and the law, and ultimately acquit his client. This was a jury nullification argument.

Encouraging jurors to ignore the law is a destructive practice in criminal trials because it impedes the fair administration of justice.[3] Making jury nullification arguments during trial improperly encourages jurors to ignore their oaths and legislate from the jury box, which is outside the scope of the jury's role in the criminal justice system, undermines the judicial process, and actually impedes the reformation of unjust laws.[4] Therefore, the rules of professional

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Special thanks to W. Mike Perry, an assistant district attorney and the prosecuting attorney for the trial described in the Introduction. The anecdote and facts from this trial are drawn from my own knowledge and memory as I personally witnessed the entire trial.

2. ALASKA STAT. § 11.71.040(a)(3) (2016).

3. *See, e.g.,* Albert W. Alschuler, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 889-90 (1994) (discussing the importance of impaneling impartial jurors during the American Civil Rights era to ensure that the fate of African-American defendants would not be left in the "the hands of [their] enemies" (internal citations omitted)).

4. *See* Part V, *infra*.

conduct should be amended to hold attorneys accountable for encouraging jury nullification.

To begin, Part I of this comment describes the history and purpose of jury trials. Part II discusses the varying definitions of "jury nullification" in academic literature and case law, and then defines how the term will be used in this comment. Part III discusses the jury's inherent power to nullify and various judicial attempts to curb that power. Part IV addresses current arguments for jury nullification as a response to unjust laws. Part V explains that jury nullification arguments are always improper, regardless of motive, because they permit lawyers to present irrelevant arguments that attempt to undermine our system of checks and balances. Part VI recommends that the rules of professional conduct be amended to expressly prohibit jury nullification arguments. Lastly, Part VII offers a brief conclusion.

I. THE HISTORY AND PURPOSE OF TRIALS BY JURY

A. Trial by Jury as a Fundamental Right

The right to have criminal guilt determined by an impartial jury can be found in the main body of the United States Constitution[5] as well as in the Bill of Rights.[6] However, the right to trial by jury was not a novel idea when the Constitution and Bill of Rights were ratified.[7] The United States inherited the concept, and many other political philosophies, from its English ancestry.[8]

In 1215, with the signing of the Magna Carta, English barons gained the right to have their peers determine matters which would result in imprisonment.[9] While this right did not extend to English commoners, the signing of the Magna Carta was an important step towards establishing a rule of law beyond the arbitrary whims of the

5. U.S. CONST. art. III, § 2 ("the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury") (capitalization in original).

6. U.S. CONST. amend. VI ("in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury").

7. AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER 2 (2013).

8. *Id.*

9. MAGNA CARTA, para. 29 (Eng. 1215).

King.[10] Several hundred years later, in 1628, King Charles I signed the Petition of Right declaring the rule of law as supreme over the wishes of the King.[11] Soon after that, Parliament passed the English Bill of Rights, in part seeking to curb abuses of the jury system by declaring that jurors "be duly impaneled and returned."[12]

An early English case, known as *Bushell's Case*, further strengthened the role of the jury by protecting jurors from judicial intervention and punishment.[13] In *Bushell's Case*, William Penn and William Mead were prosecuted for practicing a religion different than the Anglican religion of the Church of England.[14] Contrary to the wishes of the judge, the jury refused to convict, and every juror was subsequently jailed for contempt.[15] Upon a petition for a writ of habeas corpus, the reviewing judge ruled that "no juror could be punished for rendering a verdict contrary to the court's opinion."[16] *Bushell's Case* paved the way for jury nullification within the English system, which included colonial America, by protecting jurors from judicial retribution following the rendering of their verdicts.[17]

When English colonists first came to the New World, they came with the promise that they would retain the same rights guaranteed to all Englishmen, including the right to trial by jury.[18] However, this turned out to be a hollow promise.[19] Despite the guarantee of the right to trial by jury, the application of the right was inconsistent; some colonies offered jury trials more often than others, and some crimes were simply more likely to be tried by juries than others.[20] Even when

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10. AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER 7-8 (2013).

11. *Id.* at 10.

12. Avalon Project, *English Bill of Rights 1689*, YALE LAW SCHOOL, http://avalon.law.yale.edu/17th_century/england.asp (2008).

13. Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N. DAK. L. REV. 409, 412 (2012) (citing Bushell's Case (1610) 124 Eng. Rep. 1006).

14. *Id.*

15. *Id.*

16. *Id*; United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

17. Duvall, *supra* note 13.

18. *See generally* DECLARATION OF INDEPENDENCE (U.S. 1776).

19. *See* DECLARATION OF INDEPENDENCE (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations").

20. Alschuler, *supra* note 3, at 872 n.17.

juries were impaneled, they would often apply the law inconsistently — juries would often nullify charges brought against those who resisted English authority.[21] In response, England expanded the jurisdiction of admiralty courts, where the right to trial by jury was not guaranteed.[22]

The English run-around of the right to trial by jury became one of the sparks that ignited the American Revolution.[23] In fact, "depriving [the colonists] in many cases, of the benefits of Trial by Jury" was one of the specific grievances listed by the founding fathers in the Declaration of Independence.[24] The founding fathers believed that the right to trial by jury was an essential element of a fair and just judicial system.[25] As it happens, safeguarding the right to trial by jury was one of the few issues the Federalists and Anti-Federalists agreed upon at the Constitutional Convention in 1787.[26]

B. Scope of the Jury's Power

Crucial to the argument over jury nullification is the question of whether it is within the scope of a jury's power to determine questions of law as well as questions of fact. Historically, juries could consider both.[27] However, as the American legal system developed and the people placed more confidence in trained judges, this standard evolved:

> As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to

21. *Id.* at 874.

22. *Id.* at 875.

23. *Id.*

24. DECLARATION OF INDEPENDENCE, para. 3 (U.S. 1776).

25. Alschuler, *supra* note 3, at 871.

26. *Id.* (quoting Federalist 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value set upon the trial by jury")).

27. Lawrence W. Crispo, *Jury Nullification: Law versus Anarchy*, 31 LOY. L.A. L. REV. 1, 8 (1997).

> make its own law, but in following democratic processes for changing the law.[28]

In 1835, a federal court in Massachusetts decided *United States v. Battiste*.[29] The court in *Battiste* recognized that jurors have the *power* to nullify but rejected the idea that jurors "have the moral *right* to decide the law according to their own notions, or pleasure."[30] In other words, jury nullification is the exercise of a power but not a right.[31] The court reasoned that if the jury would be free to determine the validity of the law as well as the facts, the law itself would be uncertain.[32] The jury would make the law, but no court would have the ability or power to review that law, thereby leaving little protection from rogue juries.[33] On the other hand, when the law is determined by the court and not by individual jurors, redress and review are available in cases of error.[34] The court emphasized that such a review process is critical to ensuring a fair criminal justice system, and further emphasized that the review process is unavailable when a jury nullifies.[35]

In 1895, the United States Supreme Court decided the seminal case of *Sparf v. United States*.[36] In *Sparf,* the defendant was charged with felonious murder on the high seas.[37] He was ultimately convicted and sentenced to death.[38] At trial, the judge had declined to offer a jury instruction on manslaughter, ruling that the evidence was insufficient to support a conviction on the reduced crime.[39] The judge instructed the jury that the accused was either to be convicted or acquitted of the crime charged and no other.[40] A post-verdict

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28. United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).
29. United States v. Battiste, 24 F. Cas. 1042 (Mass. 1835).
30. *Id.* at 1043 (emphasis added).
31. *See id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *See id.*
36. Sparf v. United States, 156 U.S. 51 (1895).
37. *Id.* at 52.
38. *Id.*
39. *Id.* at 63.
40. *Id.*

discussion with the jury revealed that several jurors had wanted to convict the defendant of manslaughter in lieu of murder.[41] These jurors were concerned the defendant would be sentenced to death, a sentence they did not want imposed on the defendant.[42] On appeal, Sparf argued that the jury should have received an instruction on the lesser charge of manslaughter.[43] In affirming the conviction, Justice Harlan wrote, "Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and principles of law applicable to the case on trial."[44] According to the Court, the purpose of giving instructions on lesser offenses is so that juries can consider lesser charges *when the evidence permits*.[45] Instructions on lesser offenses are not meant to be used by jurors to arbitrarily apply the law as a means of shortening a defendant's sentence.[46] Both *Battiste* and *Sparf* support the notion that questions of law should remain in the hands of the court, not the jury.[47]

Juries serve a distinct purpose in the course of a criminal trial.[48] Essentially, every criminal prosecution consists of two inquiries: (1) whether there is a law governing the alleged conduct, and (2) whether the accused actually violated that law.[49] The first is a question of law requiring a certain knowledge of the law and judicial process.[50] The second is a question of fact that can be decided simply with knowledge of the evidence and an understanding of the everyday affairs of reasonable people.[51] In 1855, when discussing the delineated roles between judge and jury, Chief Justice Shaw of the Massachusetts Supreme Court eloquently noted that:

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41. *Id.* at 62 n.1.
42. *Id.*
43. *Id.* at 53.
44. *Id.* at 63.
45. *Id.*
46. *Id.* at 63-64.
47. United States v. Battiste, 24 F. Cas. 1042, 1043 (Mass. 1835); Sparf v. United States, 156 U.S. 51, 63 (1895).
48. *See* Commonwealth v. Anthes, 71 Mass. 185, 198 (5 Gray 185) (1855).
49. Commonwealth v. Anthes, 71 Mass. 185, 192 (5 Gray 185) (1855).
50. *Id.* at 192-93.
51. *Id.* at 193.

> [T]he true glory and excellence of the trial by jury is this; that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each, within its own sphere, performs the duty entrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights.[52]

Chief Justice Shaw recognized the importance of applying the law uniformly, and thus concluded that it is only appropriate to afford juries the power to determine questions of fact, while allowing questions of law to remain in the hands of trained judges.[53]

II. DEFINING "JURY NULLIFICATION"

Jury nullification is a relatively simple notion, but in practice it has many nuanced definitions.[54] *Black's Law Dictionary* defines jury nullification as:

> [A] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[55]

It should be noted that jury nullification is not synonymous with acquittal. A jury does not nullify when it acquits due to mistake or insufficiencies in the prosecution's case.[56] Such acquittals are not the same as nullification; nullification requires a subjective intent by jurors to reject the law being applied to the specific facts of a case.[57]

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52. *Id.* at 198.

53. *Id.* at 191.

54. *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 878 (1999) ("the press used the term [jury nullification] so loosely that it came to mean any verdict with which the press and public disagree").

55. *Jury Nullification*, BLACK'S LAW DICTIONARY (10th ed. 2014).

56. *See* Marder, *supra* note 54, at 882-83 (1999).

57. *Id.*

One commentator noted that academics and theorists favor jury nullification more than judges,[58] and as a result, the term's definition may vary depending on the level of reverence or disdain that is felt for the practice. Legal scholars commonly describe jury nullification as a moral practice; they consider jury nullification an act of mercy[59] and argue that it allows jurors to render a "verdict[ ] of conscience"[60] and employ their own community values.[61] Under certain circumstances, other scholars view jury nullification as a moral responsibility,[62] arguing that it protects the personal integrity of jurors by allowing them to do what they believe is just, regardless of the law.[63]

In contrast, judges commonly define jury nullification as a lawless, anarchical practice.[64] In *United States v. Dougherty*, Judge Leventhal wrote, "jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy."[65] In *United States v. Moylan*, Judge Sobeloff wrote, "No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic."[66] Many judges recognize that the practice allows a criminally accused's fate to be determined by the whims of jurors and not by a good faith effort to apply the law.[67]

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58. Darryl K. Brown, *Jury Nullification Within The Rule Of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

59. David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 91 (1995).

60. Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959 (2006).

61. Andrew J. Parmenter, Note, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L. J. 379, 421 (2007).

62. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 679 (1995).

63. Parmenter, *supra* note 61, at 427.

64. United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969).

65. *Dougherty*, 473 F.2d at 1133.

66. *Moylan*, 417 F.2d at 1009.

67. People v. Williams, 21 P.3d 1209, 1223 (Cal. 2001).

For this comment, jury nullification is defined as a jury's intentional rejection of evidence proving guilt beyond a reasonable doubt in order to acquit the defendant for some reason other than the prosecution's failure to meet the burden of proof. This definition covers the requisite specific intent and omits acquittals based on mistake or misunderstanding, as well as justified, proper acquittals based on insufficient evidence.[68]

III. COURT RESPONSES TO JURY NULLIFICATION

Jury nullification ultimately exists in the "twilight" between judicial condemnation and permission — judges strongly denounce the practice but are unable to control it.[69] As discussed in Part II, *Bushell's Case* set precedent prohibiting the punishment of jurors for their verdicts.[70] Despite this prohibition, many judges have discovered ways to avoid the excessive exercise of jury nullification without truly invading the secrecy of jury deliberations.[71] Courts have generally invalidated the practice of jury nullification by refusing to grant requests for nullification instructions, refusing to consider nullification when granting post-conviction relief, and removing nullifying jurors for cause.[72]

It is important to note that judges cannot directly prohibit jury nullification.[73] While an impartial jury is fundamental to a fair trial, the court has little power to ensure impartiality once the jury has been impaneled.[74] The protection given to jurors in *Bushell's Case* highlights the importance of minimizing judicial interference with juries and their deliberations.[75] If jurors feel the court is micromanaging their deliberations, any decision rendered by the jury

68. *See* Marder, *supra* note 54, at 882-83.

69. Duvall, *supra* note 13, at 414.

70. *Id.* at 412.

71. *Id.* at 415.

72. *Id.*

73. United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997); Marder, *supra* note 52, at 881-82.

74. *Thomas*, 116 F.3d at 608; People v. Williams, 21 P.3d 1209, 1214 (Cal. 2001).

75. *See generally* Bushell's Case (1610) 124 Eng. Rep. 1006.

will be tainted by the court's interference, which ultimately infringes upon the defendant's right to a fair trial.[76]

Jury nullification then, in the words of Justice Learned Hand, is "the assumption of a power which [the jurors] had no right to exercise."[77] The power the jury has to nullify was never an explicit right, but one derived from several protections afforded the criminally accused, such as the jury's right to reach a verdict without explanation.[78] In criminal trials, there are limited circumstances when the judge can overrule a guilty verdict, but a judge can never force a conviction after a jury renders a verdict of not guilty.[79] In that context, jury nullification is not an enforceable right but a secondary effect of other rights.

However, judges are not powerless to combat "this so-called right."[80] Courts can minimize the reach of jury nullification by refusing to include a jury instruction that outlines the jury's power to nullify.[81] Explicitly informing the jury of the power to nullify through an instruction could encourage "the substitution of individual standards for openly developed community rules," resulting in lawless verdicts and a denial of due process.[82]

Further instruction on jury nullification is ultimately unnecessary because jurors already know that they are never required to render a guilty verdict.[83] It is presumed that jurors understand and follow jury instructions.[84] The instructions include permissive language regarding conviction; even if juries believe all elements of a particular crime have been proven beyond a reasonable doubt, jurors are only

76. *E.g.,* Bushell's Case (1610) 124 Eng. Rep. 1006 (the result of an acquittal was imprisonment for the jurors).

77. Steckler v. United States, 7 F. 2d 59, 60 (2d Cir. 1925); Dunn v. United States, 284 U.S. 390, 393 (1932) (Justice Holmes writing for the majority); Standefer v. United States, 447 U.S. 10, 23 (1980); *Thomas*, 116 F. 3d at 615.

78. *Williams*, 21 P.3d 1209, 1215.

79. *Thomas*, 116 F.3d at 616; Marder, *supra* note 54, at 881-82.

80. United States v. Dougherty, 473 F. 2d 1113, 1133 (D.C. Cir. 1972).

81. *See* United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

82. *Id.*

83. *Dougherty*, 473 F.2d at 1135.

84. Strickland v. Washington, 466 U.S. 668, 695 (1984).

instructed that they *may* convict.[85] Jurors are never instructed under any circumstances that they must convict.[86]

In post-conviction proceedings, courts will not assume a jury was willing to nullify but did not do so because they were not informed of such power.[87] This argument often arises in situations where a defendant claims ineffective assistance of counsel based on defense counsel's failure to argue for jury nullification.[88] However, failing to argue for jury nullification cannot be considered when determining the effectiveness of counsel.[89] In determining whether to grant post-conviction relief based on attorney error, the court must presume judges and jurors acted in accordance with the law.[90] A defendant is not entitled "to the luck of a lawless decision maker,"[91] so the mere possibility of a jury nullifying is not enough to affect the outcome of his or her trial. The very nature of jury nullification requires jurors to ignore the jury instructions given to them before deliberation. If the presumption is the jury followed the law, the presumption is also the jury would not nullify if informed of such power.

Voir dire, a French term meaning "to speak the truth," is the process used to select an impartial jury and is a fundamental component of a fair trial.[92] While the accused is entitled to a fair trial, so too are the people, as represented by the prosecutor.[93] When a prospective juror expresses his or her intention to nullify during voir dire, before any evidence has been presented, he or she has admitted to being unable to impartially evaluate the case. By definition, a

85. *Dougherty,* 473 F. 2d. at 1135.

86. *Id.*

87. *See* Strickland v. Washington, 466 U.S. 668, 695 (1984).

88. *See id.* at 668.

89. *Id.* at 695 ("an assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like").

90. *Id.*

91. *Id.*

92. Crispo, *supra* note 27, at 41.

93. Levine v. U.S. District Court, 764 F.2d 590, 596-97 (9th Cir. 1985). While the prosecution does not have a Sixth Amendment right to a fair trial, there is a "fundamental interest of the government and the public in insuring the integrity of the judicial process. Society has the right to expect that the judicial system will be fair and impartial to all who come before it." *Id.*

prospective juror who expresses his intention to nullify by disregarding judicial instructions has admitted his inability to perform the duties of a juror.[94] Expressing the intent to nullify during voir dire is analogous to expressing the intent or tendency to convict, despite the presumption of innocence. Thus, attorneys and judges are justified in excusing jurors who demonstrate their intention to nullify during voir dire.[95]

A juror who expresses his intention to nullify may also be excused for cause after the jury is impaneled but before a verdict is reached.[96] Dismissing a juror after deliberations has begun is not the preferred procedure, but it is not an abuse of judicial discretion to do so.[97] In fact, it would be a "dereliction of duty for a judge to remain indifferent to reports" of jurors refusing to follow their oaths during the course of a trial.[98] Judges have to question jurors individually and delicately so as to gain sufficient information as to the juror in question, but not so far as to influence the deliberations.[99] Presiding judges can, and should, substitute a juror who is "unable to perform or disqualified from performing their duties," including those jurors who refuse to apply the law after taking an oath to do so.[100] Therefore, an expressed intention to nullify is just cause for excusing a juror at any point during the trial process up until the verdict is rendered.[101]

IV. REBUTTING ARGUMENTS FOR JURY NULLIFICATION

On a more abstract level, arguing for jury nullification does not only encourage jurors to render verdicts based on morality and fairness, as proponents commonly argue. Jury nullification arguments also allow attorneys to play to the prejudices and biases inherent in

94. *See* People v. Williams, 21 P.3d 1209, 1213 (Cal. 2001); United States v. Thomas, 116 F.3d 606, 608 (2d Cir. 1997).

95. Crispo, *supra* note 27, at 42.

96. *Thomas*, 116 F.3d at 614; United States v. Patterson, 587 Fed. Appx. 878, 889 (6th Cir. 2014) *cert. denied,* 136 S. Ct. 33 (2015).

97. United States v. Geffrard, 87 F.3d 448, 452 (11th Cir. 1996).

98. *Thomas*, 116 F.3d at 616.

99. *See, e.g., id.* at 610-11 (describing the in camera interviews conducted to determine the prudence of removing Juror No. 5).

100. *Id.* at 617 (quoting FED. R. CRIM. PROC. 24).

101. *See id.*

every person. This makes it necessary to address and rebut common justifications for jury nullification arguments. These justifications tend to fall into two categories: (1) contesting specific laws and how they are applied to a specific defendant,[102] and (2) preemptively contesting the forthcoming sentence resulting from a conviction.[103]

A. The Zenger *Effect: Jury Nullification in Response to Contested Laws*

Proponents of nullification commonly support their position by citing cases where nullification achieved a sympathetic result, such as the 1735 seditious libel trial of Peter Zenger, where the jury refused to convict Zenger for voicing criticism of the Crown,[104] and various 19th century prosecutions under the fugitive slave laws, where juries refused to convict those aiding escaped slaves flee the South.[105] These cases involved the types of moral dilemmas that proponents argue are the very reasons juries should have the power to nullify.[106]

Peter Zenger was charged with seditious libel for criticizing the Governor of New York, who was appointed by the King of England.[107] It is important to note that at the time of Zenger's trial, judges would determine whether a statement was libelous.[108] If the judge found the statement to be libelous, the jury would then determine if the defendant published the statement.[109] Truth was not a defense to libel, and Zenger's attorney, Andrew Hamilton, was ordered not to argue that it was.[110] Instead, Hamilton urged the jurors to reach their conclusion based on their collective consciences, and decide for themselves whether the statements were libelous,

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102. *See infra* Part IV.A.

103. *See infra* Part IV.B.

104. *Dougherty,* F. 2d at 1130; Alschuler, *supra* note 3, at 872.

105. United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972); *see* Aaron McKnight, Comment, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1107 (2013).

106. *See* People v. Williams, 21 P.3d 1209, 1214 (Cal. 2001).

107. Alschuler, *supra* note 3, at 872 (the Governor had fired Lewis Morris, a judge, and Morris hired Zenger as editor and printer of a new journal).

108. *Id.* at 873.

109. *Id.* at 872.

110. *Id.*

notwithstanding the fact that the court had already made this finding.[111] In other words, Hamilton argued for jury nullification, and the jury ultimately acquitted Zenger of the charges against him.[112] It is important to reiterate that the Zenger trial was held in 1735, before the Revolutionary War and before the signing of the United States Constitution.[113] While jury nullification was arguably justified at the time because the colonists did not benefit from any protections equivalent to those eventually guaranteed by the First Amendment, today, Zenger would not be guilty of any crime.[114] For this reason, Zenger's trial is a relatively outdated example of an arguably justified use of jury nullification.[115]

The *Zenger* court was not the last to balance jury nullification and free speech.[116] At the very heart of the *Zenger* argument advocating for jury nullification was political dissention.[117] One of the most polarizing political issues of the twentieth century was the Vietnam War, which came with mounting anti-war demonstrations and an increase in judicial review of the jury nullification issue.[118] In the 1960s and 1970s, the United States Circuit Courts of Appeals heard numerous cases involving the burning of draft cards as well as other protest-related crimes.[119]

In 1969, the Fourth Circuit Court of Appeals decided *United States v. Moylan*,[120] which involved nine defendants who had been

111. *Id.*

112. *See* Alschuler, *supra* note 3, at 873.

113. *See* U.S. CONST. art. VII.

114. *See* U.S. CONST. amend. I.

115. *Cf.* United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) ("[T]he judges in the courts were not the colonial appointees projecting royalist patronage and influence but were themselves part and parcel of the nation's intellectual mainstream, subject to the checks of the common law tradition and professional opinion, and capable, in Roscoe Pound's words, of providing true judicial justice standing in contrast with the colonial experience") (internal quotations omitted).

116. *See* Crispo, *supra* note 27, at 12-16.

117. *See* Alschuler, *supra* note 3, at 872-73 (Zenger's paper "was the first journal of political criticism in America" when the "well-established rule was: The greater the truth, the greater the libel").

118. *See* Crispo, *supra* note 27, at 12.

119. *Id.* at 12-16.

120. United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

convicted of various crimes relating to the burning of Selective Service files with homemade napalm.[121] The defendants, "men and women of sincere and strong commitments," admitted committing the acts but characterized them as a protest against the Vietnam War.[122] The defendants challenged their convictions based on the district court's refusal to give a jury nullification instruction, and the court's refusal to allow defense counsel to argue for jury nullification.[123] The court, relying on *Sparf v. United States*, held that while the jury had the power to nullify, it would be improper to explicitly inform them of such power and that the attorneys had no right to dispute the law as given by the court in front of the jury.[124] After *Moylan,* federal courts consistently rejected the notion that jurors were entitled to be informed of their power to nullify charges.[125]

Proponents also point to nullification as a response to the law itself, instead of just the law's application.[126] For example, the Fugitive Slave Act of 1850 criminalized assisting escaped slaves avoid capture.[127] During the mid-nineteenth century, more and more Northerners began to oppose slavery, and when impaneled to hear Fugitive Slave Act cases, would often nullify the charges against those who had harbored escaped slaves.[128] Many abolitionists reasoned that slavery was morally wrong, and therefore, people should not be punished for assisting slaves reach freedom.[129]

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121. *Id.* at 1003.

122. *Id.* In a parallel argument challenging the sufficiency of the jury instruction defining "willfully," the defendants characterized their motive in burning the files as "good," because they were protesting a war they sincerely believed was illegal and immoral. *Id.* at 1004.

123. *Id.* at 1004.

124. *Id.* at 1007.

125. Crispo, *supra* note 27, at 16 (citing United States v. Wiley, 503 F.2d. 106, 107 (8th Cir. 1974)).

126. Rubenstein, *supra* note 60, at 972-73.

127. Compromise of 1850, 31st Cong. Page 464 § 7 (1850) http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=009/llsl009.db&recNum=491.

128. Mary Claire Mulligan, *Jury Nullification: Its History and Practice*, COLO. LAW., December 2004, at 73.

129. McKnight, *supra* note 105, at 1115.

Hindsight accepts this justification because of the obvious immorality surrounding the institution of slavery.[130] However, jury nullification has not always been supported by such levels of moral justification.[131] After the Civil War, Southern juries would often nullify charges in cases where white defendants were accused of perpetrating crimes against African-Americans.[132]

There seems to be an assumption by jury nullification advocates that juries will only practice nullification in ways that they, the advocates, would consider morally acceptable, such as in the cases of seditious libel and violations of fugitive slave laws.[133] However, this has not always been the case. One commentator noted:

> The complaints of federal authorities concerning Southern jury nullification following the Civil War resembled the complaints of Southern authorities concerning Northern jury nullification before the War and the complaints of English authorities concerning jury nullification in the colonial period. Southern juries, however, appeared to be nullifying laws against personal violence rather than laws requiring cooperation in returning escaped slaves or paying duties imposed by an unrepresentative government.[134]

One court, also noted how the moral standard guiding jury nullification was also diminished in the cases where juries nullified alcohol related charges during Prohibition, and more generally in cases of heat-of-passion crimes.[135]

There is no way to predict why jurors might choose to nullify, and therefore no way to ensure jury nullification occurs for some justifiable, moral reason akin to the justifications in the *Zenger* or Fugitive Slave Act trials. Permitting arguments for jury nullification allows attorneys to prey on the prejudices and biases of jurors as well as their internal senses of morality. Because jury nullification can occur for both moral and immoral reasons, attorneys should not be allowed to encourage jury nullification.

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130. *See* U.S. CONST. amend. XIII.
131. Marder, *supra* note 54, at 888-890; Alschuler, *supra* note 3, at 890.
132. *Id.*
133. United States v. Dougherty, 473, F. 2d 1113, 1134 (D.C. Cir. 1972).
134. Alschuler, *supra* note 3, at 890-91.
135. *Dougherty*, 473 F.2d at 1130.

B. Challenging Sparf: Jury Nullification in Response to Contested Sentences

The only court that has directly challenged the holding in *United States v. Sparf* was the District Court for the Eastern District of New York in *United States v. Polouizzi*.[136] In *Polouizzi*, there was no question as to Polizzi's[137] factual guilt.[138] Jurors believed Polizzi committed the crimes as they were charged but had serious concerns regarding how Polizzi would be sentenced in light of Polizzi's questionable mental health.[139] After three days of deliberation, the jury rejected Polizzi's insanity defense and convicted him of all counts charged in the indictment.[140]

A post-verdict discussion with the jurors indicated that, even though they had rejected the insanity defense, the jurors believed Polizzi should not be imprisoned, but instead given mental health treatment.[141] During this discussion with the jurors, the court informed the jurors that the mandatory minimum sentence for Polizzi would be five years.[142] After learning this, several jurors admitted that had they known what the forthcoming sentence would be they would have voted to find Polizzi not guilty by reason of insanity to prevent Polizzi's incarceration.[143]

Judge Weinstein's memorandum and order granting Polizzi a new trial includes a detailed argument defending the jury's power to nullify.[144] Judge Weinstein's order demonstrates a rare departure from

136. United States v. Polouizzi, 687 F. Supp. 2d 133 (E.D.N.Y. 2010) *vacated on other grounds*, United States v. Polouizzi, 393 Fed. Appx. 784 (2d Cir. 2010). The final *Polouizzi* decision was the result of a rather complicated procedural history with little relevance to this comment. The specific opinion cited here dealing with jury nullification was the result of a motion for a new trial based on juror comments post-verdict. *Id.* at 137.

137. The spelling of the defendant's name within the opinion (Polizzi) differs from the defendant's name in the case name (*Polouizzi*). *See id.* at 137.

138. *Polouizzi*, 687 F. Supp. 2d at 163-64.

139. *Id.*

140. *Id.* at 152.

141. *Id.* at 153.

142. *Id.*

143. *Id.* at 153.

144. *Id.* at 133.

the trend exhibited in Part II where judges tend to view jury nullification unfavorably.[145] In defending the practice, Judge Weinstein insisted that the role of the jury must be determined by looking at the intentions of the Framers in 1791 when they ratified the Bill of Rights.[146] Under this view, the jury has the power to acquit regardless of the strength of the evidence, and it is entirely within the jury's right to evaluate the justness of the forthcoming sentence when determining guilt.[147] Judge Weinstein criticized negative depictions of jury nullification as not supported by the history and intended purpose of the Sixth Amendment.[148]

However, the court in *Polouizzi* failed to recognize an important development in the American judicial system since the adoption of the Sixth Amendment: judicial qualifications.[149] In the eighteenth and early nineteenth centuries, there were not many trained lawyers and judges in the United States.[150] In fact, many judges had no legal training at all; instead their professions often included farming and blacksmithing.[151] Absent legal qualifications, jurors were nearly as suited to determine legal issues as the actual legal professionals.[152] As the law became more comprehensive and complex, so did the requisite training for judges.[153]

Judge Weinstein did recognize that the right to trial by jury "was expected to limit the kind of governmental overreaching that led to the Revolutionary War."[154] One example of which was excessive

145. *See* Brown, *supra* note 58, at 1151-52.

146. United States v. Polouizzi, 687 F. Supp. 2d 133, 167 (E.D.N.Y. 2010) *vacated on other grounds*, United States v. Polouizzi, 393 Fed. Appx. 784 (2d Cir. 2010) (stating that this is the majority approach of the United States Supreme Court regarding the interpretation of the Sixth Amendment).

147. *Id.* at 168.

148. *Id.*

149. *See id.* at 133.

150. Alschuler, *supra* note 3, at 903-04.

151. *Id.* at 905, n.204.

152. *Id.* at 904.

153. Commonwealth v. Anthes, 71 Mass. 185, 198 (5 Gray 185) (1855).

154. United States v. Polouizzi, 687 F. Supp. 2d 133, 169 (E.D.N.Y. 2010) *vacated on other grounds*, United States v. Polouizzi, 393 Fed. Appx. 784 (2d Cir. 2010).

sentencing.[155] Currently, it is an ethical violation for an attorney to argue a defendant will receive an excessive sentence if convicted because sentencing decisions are solely within the purview of the court and not relevant to the issue of guilt.[156] Such delineation of roles between the judge and jury ensures that sentencing decisions can be reviewed, allowing higher courts to amend sentences when appropriate.[157] Applying a pre-Constitution analysis to modern jury nullification ignores the procedural safeguards put in place to avoid the type of governmental overreach that led to the Revolutionary War. "The old rule [allowing juries to determine questions of law as well as fact] survives today only as a singular relic."[158]

V. ARGUING FOR JURY NULLIFICATION IS ALWAYS IMPROPER

A. Meeting Standards of Relevance

In addition to the reasons articulated in Part IV, jury nullification arguments are also improper because they do not pass the fundamental evidentiary threshold of relevance. Jury nullification arguments can never be relevant as prescribed by the rules of evidence. Attorneys' arguments are not evidence, but a tool used to present the evidence in the light most favorable to their position.[159] While the arguments alone may not be evidence, if an attorney intends to argue for jury nullification, the attorney may elicit some evidence during trial that is only relevant to the nullification argument. To be presented to a jury, evidence must be relevant.[160] Evidence is relevant if it has any tendency to make any *fact of consequence* more or less likely to have occurred.[161] The easiest way to determine if a fact is of consequence is

155. *Id.* at 170.

156. *See* Fairness to Opposing Counsel, MRPC Rule 3.4(e); *see also* Part IV.A, *infra*.

157. *Anthes*, 71 Mass. at 195.

158. United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972).

159. *See* United States v. Macias, 32 F. App'x. 224, 226 (9th Cir. 2002) (informing the jury that attorney arguments are not evidence mitigates prejudicial effect of the arguments).

160. FED. R. EVID. 402.

161. FED. R. EVID. 401.

to ask whether the fact is directly related to an element of a charge or defense.

For example, turn back to the case discussed in the Introduction. The jurisdiction in which the case was tried required the prosecution to prove beyond a reasonable doubt that the defendant possessed any amount of a Schedule 1A controlled substance.[162] This can essentially be broken down into three elements: (1) possession, (2) any amount, and (3) a Schedule 1A controlled substance. Facts of consequence would relate to proving or disproving any of those three elements.

Because jury nullification arguments do not present facts related to any elements of the offense, or any potential legal defense, the arguments are not relevant. During the trial discussed in the Introduction, the defense attorney focused on the minimal amount of heroin in the defendant's possession and its potential effects (or lack thereof) upon the user. This would ultimately provide the supposed justification for nullification — if the defendant did not have enough heroin to get high, what harm did the possession bring about? During closing, defense counsel used an elephant metaphor to inform the jury that they did not have to apply the law provided by the judge.[163] This presentation of evidence and argument does not tend to make it more or less likely that the defendant was (1) in possession of (2) any amount of (3) heroin, a Schedule 1A controlled substance. Therefore, it was not relevant to that case.[164]

The purpose of evidentiary rules is to ascertain the truth and to promote the fair administration of justice.[165] Encouraging jury nullification during trial goes against these purposes. Jury nullification attacks the *law* as applied to the defendant; not the *case* against the defendant. Turning back to the example in the Introduction, the defense attorney was not attacking the case against the defendant. He did not question the veracity of the investigation, the credibility of the witnesses, the crime lab's results, or the overall sufficiency of the

162. ALASKA STAT. § 11.71.040(a)(3) (2016).

163. *See* Introduction, *supra*.

164. It is important to reiterate the difference between arguing for jury nullification and simply attempting to persuade the jury that the prosecution did not meet its burden of proof. If an attorney is attacking the sufficiency of the evidence, the argument is relevant to disproving a fact of consequence, and therefore, those arguments are relevant.

165. *See* FED. R. EVID. 102; CAL. EVID. CODE § 2.

evidence to support a conviction beyond a reasonable doubt. He simply told the jurors they should acquit the defendant for no other reason than because they could. There is no evidentiary justification for such arguments because they do not meet the evidentiary threshold of relevance.

B. Undermining the Separation of Powers

The legislative branches of government at both the federal and state levels, as representative bodies, are responsible for enacting and changing laws.[166] Federal and state legislators, not jurors, are elected by the People.[167] The People determine the laws they want to be bound by through their elected officials.[168] The hijacking of laws by unaccountable jurors undermines the system of checks and balances that is the cornerstone of the American form of government.[169]

The jury is an institution inherently within the realm of the judicial branch.[170] The jury has no power to directly amend or repeal laws, as that is the role of the legislative branch.[171] As such, the jury is not truly a political institution with the prerogative to "nullify" laws.[172] To have any effect beyond a single case, official changes to purportedly unjust laws must be done by the legislature. While colonial juries operated as a check on government power, it is now generally recognized that the democratic process is a more valid means for amending laws than the arbitrary decisions of jurors.[173] The consistent application of laws, not applications based on the arbitrary whims of individual jurors, is as necessary to protect citizens against anarchy as it is to protect against tyranny.[174]

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166. *See* U.S. CONST. art. I, § 8, para. 18.

167. U.S. CONST. art. I, § 2.

168. *See generally* U.S. CONST. art. I.

169. *See* Brody, *supra* note 59, at 90 (political power within the United States is separated between the three branches of government through a system of checks and balances).

170. *See* U.S. CONST. art. III.

171. *See* U.S. CONST. art. I, § 8, cl. 18.

172. *Nullify*, BLACK'S LAW DICTIONARY (10th ed. 2014).

173. *See* United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

174. *See id.* at 1137.

C. Ethical Implications of Arguing for Jury Nullification

As discussed in Part III, failure to argue for jury nullification is not grounds for claiming ineffective assistance of counsel.[175] In fact, arguing for jury nullification could actually have adverse ethical implications for an attorney.[176] This comment argues that there should be consequences for such action.

Jury nullification arguments require the attorney to argue, at least implicitly, that his client did commit the crime, and then regardless of that fact, ask the jury to acquit the defendant for some other reason.[177] This argument is implicitly prohibited under the rules of professional conduct.[178]

ABA Model Rule of Professional Conduct 3.4, entitled "Fairness to Opposing Counsel," states:

> A lawyer shall not . . . in trial, *allude to any matter that the lawyer does not reasonably believe is relevant* or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or *state a personal opinion as to the justness of a cause*, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.[179]

All states except Alabama have adopted this portion of the rule and its relevant parts with identical or similar language.[180] Accordingly, arguing for jury nullification would theoretically violate the rules of professional conduct.

Arguing for jury nullification violates Rule 3.4 in two ways. First, the attorney alludes to something irrelevant or unsupported by the

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175. Strickland v. Washington, 466 U.S. 668, 695 (1984).

176. MODEL RULES OF PROF'L CONDUCT, R. 3.4(e).

177. *See* Rebecca Love Koulis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109, 1115 (1996).

178. *See* Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 613 (Nev. 2014).

179. MODEL RULES OF PROF'L CONDUCT, R. 3.4(e) (emphasis added).

180. AMERICAN BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.4 FAIRNESS TO OPPOSING COUNSEL, (May 6, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.authcheckdam.pdf.

facts. Second, the attorney explicitly or implicitly asserts his or her own opinion regarding the justness of his or her client's actions.[181] As explained above in Part V(a), jury nullification arguments cannot be relevant to the elements of a charge or defense; they are simply a last-effort plea for acquittal.

Nullification defenses come in numerous forms. For example, the defendant may regret and apologize for his actions; the defendant may acknowledge that she fought with her boyfriend but that she had the situation under control and did not want to involve the police; or the defendant might argue that he should not be convicted of possessing such a small amount of drugs.[182] These defenses are irrelevant to the determination of guilt,[183] present personal opinions as to the justness of the defendant's actions, and are not supported by the type of moral justification envisaged by nullification proponents.[184] Therefore, Rule 3.4 should be reworded to make clear that attorneys cannot argue for nullification without violating the rules of professional conduct.

VI. ENSURING ATTORNEY ACCOUNTABILITY

An expanded use of jury nullification will lead to the destruction of the rule of law because juries will determine which laws are enforced and to whom they should apply. *Bushell's Case* and its progeny protect jurors from being punished for rendering verdicts contrary to the law.[185] However, this protection does not, and should not, extend to attorneys. As explained in Part V, jury nullification arguments are always improper because they are not relevant, they undermine the balance of power between the legislative and judicial branches of government, and they implicitly violate the rules of professional conduct.[186] Therefore, this comment recommends amending Rule 3.4, and further recommends that states follow suit by

181. Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 613 (Nev. 2014) (the relevant Nevada rule of professional conduct mirrors MRPC 3.4(e)).

182. These examples are based on actual arguments I have personally witnessed in different trials with different defense attorneys.

183. *See* Part V.A, *supra.*

184. *See* Part IV, *supra.*

185. *See* Duvall, *supra* note 13.

186. *See* Part V, *supra.*

amending their respective rules to *explicitly* prohibit jury nullification arguments in criminal trials.

As written, the ABA Model Rules do not specifically prohibit jury nullification. The American Bar Association recognizes that "[d]efense counsel should not make arguments calculated to appeal to the prejudices of the jury" or make arguments "which would divert the jury from its duty to decide the case on the evidence."[187] However, the ABA does not intend these standards to be used as criteria for misconduct,[188] so they are insufficient to guide attorney conduct or ensure attorney accountability. Jury nullification arguments are, therefore, frowned upon but not truly prohibited.[189] A true prohibition of such arguments is necessary to maintain the integrity of the criminal trial process.

Model Rule 3.4 should be amended to include the following language: "A lawyer shall not, in criminal trials,[190] either explicitly or implicitly, encourage members of the jury to disregard the law supplied to them by the judge." This amendment would not prohibit jury nullification itself. Rules of professional conduct only apply to lawyers, so the amendment would not affect jurors wishing to nullify. Prohibiting jury nullification would not be enforceable because jurors cannot be held accountable for their verdicts. However, attorneys can be held accountable for arguing for jury nullification. The argument for jury nullification and the actual act of doing so are separate; the proposed amendment only deals with the arguments made by lawyers.

The suggested rule also covers both explicit and implicit jury nullification arguments. As noted earlier, judges generally disapprove of explicit jury nullification arguments like the elephant argument discussed in the Introduction. However, not all jury nullification arguments are so explicit and obvious. Implicit arguments can still be destructive and threaten the integrity of the criminal trial process. It is, therefore, important to prohibit both explicit and implicit jury nullification arguments.

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187. STANDARDS FOR CRIMINAL JUSTICE § 4-7.7 (1993).

188. STANDARDS FOR CRIMINAL JUSTICE § 4-7.1 (1993).

189. *See* STANDARDS FOR CRIMINAL JUSTICE § 4-7.7 (1993).

190. This comment limits the analysis of jury nullification arguments to the context of criminal trials. Whether a similar rule is necessary for civil trials is beyond the scope of this comment. Therefore, the proposed language for an amended Model Rule 3.4 is limited to criminal trials.

In addition, the language is not overly broad or vague. It clearly encompasses jury nullification but does not go so far as to forbid other permissible forms of argument.

The purpose of amending this rule is not to create additional sanctions for attorneys, but to streamline the process already in place for punishing violations of the rules of professional conduct. An explicit prohibition will be easier to enforce than an implicit one. Currently, under Model Rule 3.4, judges have much discretion to determine when attorneys cross the line into irrelevance or personal opinion without having to specifically address jury nullification. The proffered rule amendment specifies a particular form of prohibited argument, which, if accepted, would bring more predictability and consistency in the enforcement of the rules of professional conduct.

CONCLUSION

Jury nullification itself cannot be prohibited.[191] As a matter of practicality, courts must tolerate jury nullification to protect the independence of the jury deliberation process. However, just because jurors cannot be punished for exercising the power to nullify, does not mean attorneys should not be punished for making jury nullification arguments.

Jury nullification should not be encouraged because it impedes the fair and impartial administration of justice. Encouraging jury nullification is to encourage disrespect and contempt for the rule of law. Courts should not be granted the discretion to allow attorneys to encourage jury nullification. The rules of professional conduct should be amended to explicitly prohibit jury nullification arguments in criminal trials.

There was a reason the elephant was tied to a stake. While everyone likes the elephant, no one wants it rampaging through the fair unrestrained. Juries, like elephants, have great power, and at times, that power must be harnessed to ensure just and fair results. Whereas elephants are restrained by a rope, juries are restrained by the

191. *See* United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997) ("Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in the favor of the lesser of two evils protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity").

law. Expansive encouragement of jury nullification will destroy any notion of predictability in the criminal justice system. Thus, attorneys should be prohibited from encouraging juries to ignore the law when deciding the issue of guilt in a criminal trial.

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