In Jury Rooms, Form of Civil Protest Grows

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In courthouses across the country, an unprecedented level of juror activism is taking hold, ignited by a movement of people who are turning their back on the evidence they hear at trial and instead using the jury box as a bold form of civil protest.

Whether they are African Americans who believe the system is stacked against them, libertarians who abhor the overbearing hand of government or someone else altogether, these jurors are choosing to ignore a judge's instructions to punish those who break the law because they don't like what it says or how it is being applied to a particular defendant.

The phenomenon takes all forms. In upstate New York, an African American man refused to join 11 other jurors in convicting black defendants of cocaine charges, saying he was sympathetic to their struggles as blacks to make ends meet. In rural Colorado, a woman refused to convict in a methamphetamine case and caused such disruption that she forced a mistrial and was convicted herself of obstructing justice. And just last year in Montgomery County, jurors in two separate trials of developer and politician Ruthann Aron objected to her even being prosecuted on murder-for-hire charges in the first place.

In all of these cases, the jury box turned into a venue for registering dissent, more powerful than one vote at the polls and more effective at producing tangible, satisfying results.

Although they still represent a relatively small proportion of the tens of thousands of jurors who file into courtrooms every day, a striking body of evidence suggests that their numbers are increasing. Case studies and interviews with more than 100 jurors, judges, lawyers and academics reveal a significant pattern of juror defiance. Some go so far as to say jury nullification – the term for jurors who outright reject the law – represents a threat to the foundation of the American court system if it is not confronted and dealt with effectively.

"There is a real potential danger if this problem goes unchecked," said former District judge and Deputy Attorney General Eric H. Holder Jr. "I've seen what happens when ordinary citizens sit on a jury with someone who nullifies. You hear it in their comments. There is a real loss of faith. And for those who are regularly a part of the court system, there is a real cynicism that grows out of

nullification."

The most concrete sign of the trend is the sharp jump in the percentage of trials that end in hung juries. For decades, a 5 percent hung jury rate was considered the norm, derived from a landmark study of the American jury by Harry Kalven Jr. and Hans Zeisel published 30 years ago. In recent years, however, that figure has doubled and quadrupled, depending on location. Some local courts in California, for example, have reported more than 20 percent of trials ending in hung juries. Federal criminal cases in Washington, D.C., averaged 15 percent hung juries in 1996 (the most recent year for which data were available), three times the rate in 1991.

A hung jury is simply one in which the 12 men and women around the table disagree over whether to convict or acquit. But judges, lawyers and others who study the phenomenon suspect that more and more differences are erupting not over the evidence in these cases, but over whether the law being broken is fair.

Their concerns are supported by a recent nationwide poll by Decision Quest and the National Law Journal, which found that three out of four Americans said they would act on their own beliefs of right and wrong regardless of instructions from a judge to follow the letter of the law.

Because of the secrecy surrounding jury deliberations, it is impossible to know precisely how often jurors act on those views. Nonetheless, the evidence is becoming overwhelming that the problem is real.

And its proponents are becoming well-organized, promoting their call for jury activism in every state and in every form. They've printed bumper stickers and brochures, rented billboards and subway placards, and created Web sites and informal clubs urging people to stand up to the system. "What's different now," says Vanderbilt University law professor Nancy King, who has tracked the phenomenon, "is that there's an organized, national movement to change the power of the jury."

Hidden Agendas

It is difficult to tell when a juror is taking the law into his own hands. The only people in the room deliberating are the 12 who have been picked to serve, so unless one of them speaks up, no one knows why a jury reaches the conclusion it does. Nor can anyone know what motivates a particular juror. If jurors vote not to convict because they don't believe the nation's drug laws are fair, they may disguise their true feelings by simply saying the evidence wasn't there or the prosecution didn't make its case. Otherwise, they risk being ejected from the jury box.

But lawyers across the country are convinced that jurors are rejecting the law – in drug possession cases, in trials that lead to "three strikes, you're out" or other stiff mandatory sentences, and in situations that invoke evolving social values, such as the "assisted suicide" charges lodged against Jack Kevorkian.

Prosecutors see it as vigilante justice, but defense lawyers have a complicated response. Like New York defense lawyer Thomas J. O'Hern, many do not endorse nullification as a payback for race discrimination or other social grievances, but they also recognized that, if a juror does hold out on conviction, that's good for their client. "From my point of view," O'Hern said, "there are three potential verdicts, 'guilty,' 'not guilty' and 'can't decide.' 'Can't decide' is a win for me."

Some of the most sensational cases, or at least most publicized, arise when the subject of race does.

In the recent case against former agriculture secretary Mike Espy, accused of accepting illegal gratuities, independent counsel Donald C. Smaltz asked the judge to specifically instruct jurors not to consider the fact that Espy is African American. Smaltz said he was making the request because Espy's lawyer suggested to jurors that Espy was prosecuted because he is black. Racial arguments, Smaltz said, are "an attempt to encourage the jury to acquit the defendant regardless" of his guilt. Smaltz was turned down, but the daring strategy comes as fresh evidence that prosecutors increasingly believe they need to head off social vindication in the jury box. (Espy was eventually acquitted in December of all charges by a jury of 11 blacks and one white, and all of the jurors questioned afterward said it was not race that led to their verdict but their belief that Smaltz's corruption charges were overblown.)

Nine years ago, also in Washington, the celebrated trial of Marion Barry brought issues of race and jury nullification to the fore when the mayor's defense lawyer subtly appealed to jurors to reject the drug charges because the government had targeted and entrapped the controversial black mayor. The jury convicted Barry of one count of possessing cocaine, acquitted him on another count and was unable to reach a verdict on 12 other counts. In the aftermath, a majority of blacks surveyed in the city said they were "satisfied" with the verdict and a majority of whites said they were not.

That same racial polarity arose in the case of O.J. Simpson. To much of white America, polls showed, Simpson's acquittal looked more like the product of nullification than insufficient evidence. Indeed, it was after the jurors emerged with their "not guilty" verdict three years ago that the phrase "jury nullification" burst into the mainstream media. Many commentators questioned whether the predominantly black jury sided with Simpson because of his race when they acquitted him of murdering his ex-wife and her friend. The jurors insisted that there was not enough evidence to convict, and they had plenty of lingering questions about the Los Angeles police's role.

Whatever the motivations, few legal scholars would consider the Simpson case true nullification, if only because all 12 jurors on the mixed-race jury moved to acquit. More common is the lone holdout with an ax to grind who goes against the others, and who can be exposed by his frustrated colleagues.

In the Albany, N.Y., cocaine case, juror Leslie Davis appeared

rebellious from the beginning. When he was sworn in to hear the case of five siblings accused of selling drugs out of their mother's house, Davis raised a fist, rather than simply holding up an open hand. He slapped his leg and whispered, "yeah, yes," when defense lawyers tried to refute the mound of evidence: videotapes of late-night visitors to the mother's home, testimony from informants, records of big-money transfers among the unemployed brothers and sisters. In deliberations, Davis, the only African American in the jury box, proclaimed that the government's case wasn't worth "a bag of beans."

He told the white jurors they didn't understand the neighborhoods where the black defendants lived or the struggles they faced even to survive. Eventually, the other jurors sent notes to the judge telling him that Davis wasn't deliberating fairly and that he had turned the case into a racial referendum: "He thinks that everything we say is against his race," one said. When U.S. District Judge Thomas McAvoy began to dismiss Davis, saying he had become convinced that the juror wouldn't convict no matter what, Davis was enraged. "Wait a minute. You're going to dismiss me? And let the other jurors decide?" he complained.

Race also appeared to play a role in a recent case in the District that ended in a hung jury. The defendant was an African American man charged with illegal possession of a firearm. And when he took the stand, he told the jurors that the gun police found in his car was his wife's and that she carried it for protection in their Southeast neighborhood.

According to a white juror who agreed to discuss the case if his name was not used, the majority-black jury was ready to find the defendant guilty. But one juror, a black woman in her forties, told the others it was perfectly understandable why someone would want to keep a gun for protection, legal or not. And because the defendant had a prior conviction, he would probably get a long sentence if convicted. It would serve no one, particularly not a black man who she believed was trying to keep out of trouble against the odds in his poor neighborhood, to send him to prison, she argued.

For a while she was alone in her view, but she kept at it. Then, in a dramatic reversal, the foreman, also black, adopted her position, and that irretrievably deadlocked the group.

"The foreman was taking an illegal, but frankly, practical view," the white juror said. "It put me on edge. But it would have taken a fair amount of courage to challenge him."

In Oakland, Calif., jurors complained about a member of their panel who they thought was overly sympathetic to a defendant accused of robbing a Wendy's restaurant.

James R. Metters Jr. ordered some food and then told the cashier to "give him all the twenties." His hand was wrapped in cloth and the cashier later testified that she thought Metters was holding a gun, so she gave him the money, and he fled. The cashier found the restaurant manager, who immediately told a police sergeant who happened to be stopped at the Wendy's drive-through window. The

police sergeant caught Metters and found his coat and $383 in cash nearby.

During his trial, Metters's lawyer brought out that his client was being pursued by drug dealers whom he owed money. He was afraid for his life. When the jurors began deliberating, a woman identified as "Juror No. 4" felt it was wrong to convict him, according to court records. The drug dealers threatened to kill him and his family, she complained. "Shouldn't that matter?" asked this juror. Others in the room felt that the man should be convicted of the crime, whatever his motivations, and took their case to the judge. In a note, they complained that Juror No. 4 was "unfairly sympathetic to" Metters, that she had worked in a drug and alcohol rehabilitation facility and that it was affecting her ability to objectively view the facts and law in the case.

When the judge questioned the juror, she insisted that she had been "deliberating in good faith for a day and a half" but felt that there had been a breakdown in communication. "I'm not willing to deal with what went on in there yesterday," she said. "They are trying to convince me that I'm stupid."

The judge agreed with the other jurors that she was not being open-minded and dismissed her. An alternate juror was added, and the jury then found Metters guilty.

Post-Trial Disclosures

Sometimes crosscurrents among jurors only become public after the deliberations. That happened in both trials last year for Ruthann Aron, the former Maryland politician accused of trying to hire a hit man to kill her husband and a lawyer.

The first jury deadlocked last March when a lone holdout, Shawn D. Walker of Silver Spring, said she thought Aron should not be prosecuted because she hired the killer at a time when she was emotionally overwrought. Better to let her off and urge her to get counseling than to use the court system to throw her in prison, Walker felt. Other jurors later complained that Walker came to the jury box biased in favor of Aron's assertion that she was too mentally ill to realize that she was committing a crime. Walker had taught emotionally disabled children and had professional experience with mental disorders, neither of which Walker revealed during jury selection.

After the second Aron trial ended abruptly last July when Aron agreed to plead no contest, a juror revealed she also was ready to vote against conviction. "She clearly did it," said the 40-year-old female juror from the second trial who asked not to be named. "But she had bottomed out. This was a mental health issue. And, in the end, no one ended up dead."

This juror said she had never heard of "jury nullification" before that trial. But afterward, she began telling friends and colleagues about her experience and they pointed her to Internet sites urging people to take up the cause, to get on juries to "vote your conscience."

Her reflections are revealing about the process of jury activism: "You don't go in there and say, 'I don't believe in drug laws or the death penalty so I'm going to vote to acquit.' It just happens. Suddenly, people who think of themselves as law-abiding don't like the way the law is being used."

Encouraging Dissent

When it was first formed in a desolate Montana hamlet 10 years ago, the members of the Fully Informed Jury Association could conduct their business around a kitchen table. Today, they claim 6,000 devotees nationwide who help them spread the word – through the Internet, mass mailings and courthouse leafletting – that jurors should act on their own morality. And their clarion call, as well as the effect of their work in today's courtrooms, is beginning to gain attention.

"Jurors have an inherent right to veto unjust laws," said Larry Dodge, a Montana sociology professor turned libertarian activist who heads the group. Its activists have been arrested for obstructing justice in several cities for handing leaflets to jurors arriving at courthouses.

"I don't think we've ever inspired people to just fold their arms and say, 'We're going to stick it to the system.' Rather, we give them ideas for doubt about the law," Dodge said from his Helmville, Mont., office-trailer filled with stacks of pamphlets and cassette tapes carrying his message.

Dodge urges callers to his hot line not to reveal any ideological bent if they are called to serve. "Lying is sometimes the right thing to do," he says, "because judges shouldn't be asking prying questions in the first place."

Among the nation's trial judges, few have been willing to publicly voice their concerns for fear of giving the movement legitimacy or appearing to tread on juror independence. But for Colorado circuit Judge Frederic B. Rodgers, jury nullification is a consuming interest.

"It is a recipe for anarchy . . . [when jurors] are allowed to substitute personal whims for the stable and established law," said Rodgers, who has warned other judges in articles that organized activists are "coming to a courthouse near you."

If a juror dislikes a law, Rodgers and a handful of other outspoken judges insist, he should press for legislative change, not behave in a random fashion that lets one criminal off scot-free but sends another – with a different jury – to jail.

"Jury nullification is indefensible," adds D.C. Superior Court Judge Henry F. Greene, who has become concerned about the number of hung juries in the District, "because, by definition, it amounts to juror perjury – that is jurors lying under oath by deciding a case contrary to the law and the evidence after they have sworn to decide the case according to the law and the evidence."

Houston lawyer Clay S. Conrad, author of a new book defending jury nullification, asserts that it is not "anarchist." For the average

citizen, he says, nullification is an effective way of countering prosecutorial abuse and limiting the power and intrusiveness of the legislature.

Unlike libertarians Dodge and Conrad, George Washington University law professor Paul Butler comes at the subject from a different perspective, and has developed a national reputation by telling black jurors they should vote against conviction to stop another African American from ending up in prison.

"Jury nullification, for me, is a tool," Butler said. "It's a tool for some sort of fairness in the criminal justice system, where the situation is getting worse for blacks." Butler doesn't believe murderers or other dangerous criminals should be spared from conviction, but in "victimless" crimes like drug possession, he believes black jurors should protect their own.

A former prosecutor who keeps at his fingertips statistics about the disproportionate number of blacks in prison, Butler has espoused his views on national television, in speeches and in numerous publications. "If African Americans simply followed the law because whites told them to, they'd still be slaves," he maintains. "The law doesn't come from God. It comes from people like Jesse Helms and Newt Gingrich."

Challenging the System

The right to trial by a fair and impartial jury is fundamental in America and rests on the belief that a jury may be the only shield between an individual and an overzealous prosecutor or a biased judge.

But if the process is breaking down, if people are using it as a way to express a personal agenda, should the system be changed? To even address the question – which many court officials are reluctant to do – is to suggest that there is something wrong with a central component of American democracy.

Some states have debated whether to permit non-unanimous verdicts in criminal cases as a way to shut down rebel jurors who create hung juries. The rationale is that if one or two jurors fail to consider the evidence, an agreement among the 10 or 11 others could seal a verdict.

Many judges are also spending more time questioning potential jurors before they get on a trial in hopes of weeding out those who want to protest the law. And prosecutors have brought charges against jury "nullification" activists who pass out leaflets at courthouses encouraging jurors "to vote your conscience."

And yet, while a growing number of prosecutors and legal scholars believe the problem needs addressing, there is no consensus on what actions should be taken when jurors ignore the law.

"You're real hesitant as a judge to go beyond what ought to be a pretty inviolable shield" protecting jury deliberations, said Holder, a former Superior Court judge in the District. "But you do have those who go into the jury room with an agenda: 'I don't want to convict

another black guy.'."

Holder thinks officials should be more vigilant in monitoring the movement, seeing which cases tend to produce nullification, determining whether the trend is becoming "more dangerous."

Perhaps not surprisingly, prosecutors and defense lawyers are of two minds on the dangers to the system and what should be done.

"We don't want vigilante justice," said Donald Kinsella, the federal prosecutor in the Thomas family drug case who at every phase of the trial had pressed the judge to remove Leslie Davis. But defense lawyers say that when a jury is hung, it is because the prosecution has failed to make its case, whatever the reason. Defense lawyers fear that any new effort to respond to jury activism will intrude on the fairness of the jury system and ultimately lead to more convictions.

In the end, it could be argued, the system sometimes takes care of itself.

In Albany, the Thomas siblings were found guilty of drug charges by the remaining 11 jurors after Davis was removed, but they appealed.

The U.S. Court of Appeals for the 2nd Circuit, reviewing the episode, said jurors have no right to reject a law simply because they don't like it.

"Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court," the court said in its 1997 ruling, the strongest, most recent decision on the topic. The opinion by Judge Jose Cabranes said jurors who reject the law should not be allowed to serve.

But the appeals court also ordered a new trial after declaring that only "unambiguous evidence" of a juror's disregard of the law can justify his dismissal.

In a retrial, the Thomas siblings were found guilty of selling and conspiring to sell drugs – by an all-white jury.

Staff researcher Madonna Lebling contributed to this report.

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