I had the pleasure of being a panel member on sentencing issues at NACDL's seminar in Aspen this past January. After the meeting, Norman Reimer, the association's executive director, told me that a future issue of The Champion would be devoted to jury issues and asked whether I would be willing to contribute an article recounting any experiences I might have encountered as a federal district court judge for the Eastern District of New York where I suspected that jury nullification was at play. I immediately thought of two recent back-to-back acquittals in felon-in-possession gun cases, and said I would.

The Trial of a Felon- In-Possession Case

Felon-in-possession cases are perhaps the simplest cases coming before a federal district court. Certainly, they require the simplest charge: all that is needed is for the jury to determine whether the defendant was previously convicted of a crime punishable by imprisonment for more than one year, whether the defendant knowingly and intentionally possessed the firearm, and whether the firearm was shipped or transported in interstate or foreign commerce. Defense counsel invariably stipulate that the defendant is a prior felon so that the jury will not know the nature of the felony, and the interstate commerce element is often stipulated to as well, since the government can easily establish that a component part of the gun was manufactured outside of the state, which is sufficient to support that element. So it all comes down to whether the defendant possessed the gun, and the jury is succinctly instructed, in a direct possession case, that: "'Possession' simply means having physical custody or control of an item; that is, a person who has direct physical control over an object at a given time has possession of that object. Proof of ownership is not required to show possession."

And the trials are short and simple, lasting just a day or two; in the typical case, one or two police officers testify that while patrolling in a high crime area late at night there was a legitimate basis to stop and search someone (the suspect is invariably a young black or Hispanic male), and that, during the search, the gun was found in his possession. If the suspect was driving a car, the requisite suspicion warranting the stop, in order to pass Fourth Amendment muster under Terry, is often a simple traffic violation, like failing to signal for a turn. If the suspect was walking down the street, it may be as simple as observing him smoking a joint. In most cases, the legitimacy of the stop will be the subject of a suppression hearing, which, although rarely granted, affords the defendant's lawyer a free shot at cross-examining the officers prior to trial.

The Arousal of My Suspicions

My two recent cases were textbook examples of this scenario. In each, there was a suppression hearing; in denying the motions, after finding there were no Fourth Amendment violations, I found the officers' testimony that the defendants possessed the guns totally credible. In the first case, the officer testified that he saw the defendant pull the gun out from his waistband while he was running up the stairs of his apartment building, with the police officer in hot pursuit, and that he then saw the defendant toss the gun into the garbage in his apartment's kitchen, where it was retrieved. In the second case, after the police stopped the defendant for failing to make a left-hand turn signal, the officer testified that he saw the butt of the gun sticking out of the defendant's waistband, and the police officer actually pulled it out of the waistband. The testimony at the trials tracked the testimony at the suppression hearings. How, then, could the juries acquit in the face of such direct, compelling testimony?

While at first blush it may well have been that the jurors simply did not believe the officers' testimony, I suspected that there was something endemic about these types of gun possession prosecutions that troubled jurors. After all, the defendants are not caught carrying the guns in the course of committing an underlying crime, such as distributing drugs. From my experience in trying many cases where underlying crimes were alleged and felon-in-possession charges had been tacked on, jurors have rarely discredited the police officers' testimony and have almost always also convicted on the tacked-on gun charge. So my curiosity led me to inquire whether my two acquittals were aberrational.

They were not. A bureau chief from the prosecutor's office candidly told me that the acquittal rate in felon-in-possession cases was the highest in the office. Moreover, when I recently had lunch with a former law clerk who, after her clerkship, became a star prosecutor, she bemoaned the fact that the only case she

lost was a “lay-me-down” felon-in-possession case — the easiest case she ever had to try.

This confirmed my suspicion that jury nullification might be afoot — a suspicion that had actually first surfaced when I spoke to the jurors after the first acquittal. As is my practice, I make myself available to the jurors after they return their verdict to give them an opportunity to ask me whatever questions they may have about their jury duty or anything that happened during the trial. I do not inquire into the basis for their decisions; nonetheless, sometimes a juror may make a comment or two that sheds some light on the jury’s deliberations. On this particular occasion, one of the jurors blurted out that it was difficult for him to convict a young man just for carrying a gun. As best I can recall, he said: “If I lived in that neighborhood, I would carry a gun too. Most Americans have guns; the NRA opposes any restrictions on any type of gun; they are legal in most states; kids can buy them in places like Texas and Florida; and the Supreme Court has recently said it’s OK to carry a gun to protect yourself.”

While his understanding of the law was not precise, his comments are understandable considering the schizoid nature of our gun laws and the harsh statistics pertaining to gun violence in this country.

Our Gun Laws and Some Statistics

Much of the public’s confusion about our gun laws is the by-product of the compromise by the founding fathers, reflected by the Tenth Amendment, permitting each state to determine the nature and scope of criminal conduct within its borders, subject to overarching proscriptions by the federal government under the Supremacy Clause if, via the Commerce Clause, interstate commerce is affected. Thus, in the absence of permissible federal interdiction, each state may decide for itself how, if at all, it will regulate the sale or possession of firearms. This is unique to the United States, for I know of no other civilized country that criminalizes conduct in one part of its country but not in other parts. The most poignant example of this concept of states’ rights is, of course, the death penalty: 35 states have it, 15 (and the District of Columbia) do not.1

To get an overview of why confusion abounds when it comes to guns, let’s begin by first getting a grasp of the overarching federal laws. Because Congress has declared that “the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce,” the power of Congress to regulate the sale and possession of guns could conceptually empower it to cover the entire field.2 It has not, however, acted in this preemptive fashion, instead allowing state laws to govern in those areas not proscribed by federal law.

What has Congress done? In 18 U.S.C. § 922, it has criminalized the possession of certain weapons by anyone, and has criminalized the possession of any weapon by certain prohibited persons; through the broad application of the Commerce Clause, these proscriptions apply in all the states. The universally proscribed weapons are stolen firearms,3 firearms with obliterated serial numbers,4 machine guns,5 and firearms undetectable by metal detectors or x-ray machines.6 Those persons who are prohibited from possessing any type of firearm are convicted felons, fugitives, unlawful users of controlled substances, “mental defectives,” illegal aliens, those dishonorably discharged from the Armed Forces, anyone who has renounced his or her U.S. citizenship, those subject to restraining orders, anyone previously convicted of a misdemeanor domestic violence offense,7 and anyone who possesses a firearm in furtherance of a crime of violence or drug trafficking.8 In addition, juveniles (i.e., those under age 18) are federally prohibited from possessing handguns, but may possess other guns that are not on the list of universally banned firearms9 — even, ironically, military-style assault weapons.10

What else has Congress done? In 1968, it enacted the Gun Control Act,11 requiring gun dealers to be licensed; however, those “not engaged in the business” of selling firearms, or who make only “occasional” sales, are exempt. Thus, as a practical matter, under what has commonly become known as the “gun show loophole,” federal law does not preclude unlicensed sellers from selling privately owned firearms at gun shows or other temporary locations. In 1993, Congress passed the Brady Act,12 requiring those covered by the Gun Control Act to secure a background check on the putative purchaser to ensure that he or she was not a prohibited person in one of the categories mentioned previously;13 however, those within the so-called “gun show loophole,” who were not covered by the Gun Control Act, could still sell

firearms without a background check. Notably, although the states were free to plug the loophole, 32 have not done so;14 hence, in those states, there are no licensing or background check requirements regarding the private or occasional seller of firearms.

Other than the handful of firearms proscribed and the persons prohibited from possessing a firearm under the provisions mentioned above, and the limited licensing requirements and background checks under the Gun Control and Brady Acts, the states are free to do as they please.15 With 50 states weighing in on what is otherwise legal or illegal, it is no wonder the public may be confused. For example, in 43 states citizens can legally buy assault weapons, although among the seven states where some assault weapons are banned, the definition of such weapons varies.16 In 46 states there is no limit on the number of guns that can be bought at any one time, while four states impose a limit of one handgun per month.17 And, remarkably, because federal law only bars juveniles from possessing handguns, rather than all firearms,18 juvenile possession of long guns is legal in many states; counterintuitively, a 12-year old in North Carolina, although needing parental permission to play Little League Baseball, does not need permission to possess any type of shotgun or rifle (which would include semi-automatic assault rifles).19 Moreover, in 18 states, there is no minimum age requirement to possess a rifle or shotgun.20

There are, of course, many states that do require licenses for possession of firearms that are not illegal under federal law. For example, since I am not a prohibited person under federal law, and the possession of handguns is not federally proscribed, I can legally buy a handgun without a license in a number of states, but I cannot possess one in New York without a New York license;21 moreover, in New York City, I would also need a license for the possession of a rifle or shotgun.22

The maze of state gun laws, ranging from states, such as Maine, which has virtually no gun control law, to Massachusetts and Hawaii, which have highly restrictive laws,23 and the multiple variations in between from state to state, make it impossible for the average citizen to know when or where in the United States the possession of a firearm is legal — let alone which type of firearm — without consulting a lawyer or the NRA. Thus, the gun-carrying citizen traveling across state lines may be lawfully in possession of the firearm in one state but not in the other, unwittingly exposing himself to criminal prosecution. For example, even if Plaxico Burress had been lawfully licensed to possess a handgun in his home in New Jersey, this would be no defense to the gun possession charges he faces under New York law. To guard against this, the NRA has published a Guide to the Interstate Transportation of Firearms explaining the caveats gun carriers face in their interstate travels.24

Congress has also addressed the problem by providing that a firearm may be transported from one state in which that firearm may be lawfully possessed to another such state, thereby insulating the transporter from the laws of states in between where the possession of the firearm may be illegal.25 Nonetheless, the interstate traveler may not be aware that the statute contains a number of qualifications: the firearm must be unloaded; neither the firearm nor any ammunition can be “readily accessible or … directly accessible from the passenger compartment of [the] transporting vehicle”; and if the vehicle does not have a compartment separate from the driver’s compartment, the firearm or ammunition “shall be contained in a locked container other than the glove compartment or console.”26

In sum, between the federal and state gun laws, we have a patchwork of laws with many permutations that governs the legality of possessing a particular firearm, leaving the general public bedeviled to understand which guns may be legally possessed, and where. It was not surprising, therefore, that the juror who spoke to me after he voted to acquit the defendant in my first felon-in-possession case had the impression that “most Americans have guns” and that guns were “legal in most states.”

The juror’s perceptions are borne out by some chilling statistics. First, neither the federal government nor any state totally proscribes nor regulates the possession of all firearms, and many states permit the possession of a large range of firearms with few, or negligible, restrictions. Accordingly, it has been estimated that 40 percent of U.S. households contain guns.27 And our appetite for guns is on the rise: FBI statistics show that there have been 1.2 million more requests for background checks of potential gun buyers throughout the nation during the four-month period from November 2008 to February 2009 (for a total of 5.5 million) than during the comparable period a year ago.28

Our love affair with guns, bolstered by the effective lobbying efforts of the NRA to keep Congress at bay, has resulted in our country having the highest rate of gun deaths in the developed world;29 moreover, the relative numbers are truly startling. For example, statistics garnered in 2004 for gun-related homicides show New Zealand having 5; Sweden 37; Australia 56; England and Wales 73; Canada 184, and the United States 11,344.30 Even if adjusted for population disparities, the differentials are palpable: U.S. per capita homicide rates are two to 10 times those of all other developed countries.31 New York Times columnist Bob Herbert recently pointed out that: (1) there are 283 million privately owned firearms in America;32 (2) someone is killed by a gun in this country every 17 minutes; (3) eight American children are shot to death every day; and (4) since September 11, 2001, "nearly 120,000 Americans have been killed in non-terror homicides, most of them committed with guns," which is "nearly 25 times the number of Americans killed in Iraq and Afghanistan."33 Herbert further noted that nearly 70,000 Americans are shot non-fatally each year, leading to "well more than $2 billion annually" in medical costs.34

Jury Nullification

The perceptions of that juror, who candidly expressed his unwillingness to convict someone for merely possessing a gun, led me to believe that the degree of difficulty that the government has experienced in obtaining felon-in-possession convictions in my district may well be the product of jury nullification due to the public's confusion about our gun laws — such as they are, or are not — and the public's strongly held feelings toward guns.

Perhaps the textbook example of jury nullification in a gun possession case is the recent acquittal of Cpl. Melroy H. Cort. As recently reported in the Washington Post,35 the defendant, a U.S. Marine whose legs had been amputated above the knees when he was wounded by a makeshift bomb during his third tour of duty in Iraq, was traveling from his home in Ohio to Walter Reed Army Medical Center in D.C. for treatment. While traveling in Washington, he had a flat tire, forcing him to pull over at a car repair shop. A witness noticed that he had a gun in his jacket pocket and called the police, who arrested him as he was sitting in his wheelchair. He offered no resistance and readily admitted that he was traveling with the gun.

Since the defendant was not licensed to possess the gun in Washington, as required by D.C. law, his court-assigned attorney advised him that he had no defense to the charge and encouraged him to plead guilty. Cort refused, fired his lawyer, and represented himself at trial. He testified about the loss of his legs and explained that he had a permit to carry the gun in Ohio, and had brought it with him because he had moved out of his house in anticipation of an extended stay at Walter Reed. He told the jury that his commanding officer had advised him to take the gun to the armory on Walter Reed's base as soon as he arrived. Given that the defendant admitted that he possessed the gun in violation of D.C. law, his acquittal clearly amounted to jury nullification.

The province of a jury to disregard the law and engage in nullification has spawned debate and controversy throughout the years, and has been the subject of extensive commentary. The origin of jury nullification traces back to the mother country in the 1670 decision in Bushell's Case, which arose out of the underlying prosecution of Quakers William Penn and William Mead for unlawful assembly.36 At trial, the evidence of the defendants' guilt under the applicable statutes was "full and manifest," but the jury "acquitted [the defendants] against the direction of the court in matter of law, openly given and declared to them in court."37 After juror Bushell was imprisoned for disobeying the judge's instructions, he sought habeas relief in the Court of Common Pleas, where Chief Justice Vaughan ruled that the detentions were unlawful, stating that "how manifest soever the evidence was, if it were not manifest to [the jury], and that they believed it such, it was not a finable fault, nor deserving imprisonment. …"38 Bushell's Case is widely cited as the first precedent for the independence of the jury.

Closer to home, the John Peter Zenger trial in 1735 is the foremost historic example of jury nullification in the United States. Zenger was charged with publishing seditious libels against the governor of New York; it was clear he had published the writings in question. Although the court instructed the jury that it could only consider whether Zenger had printed the material at issue and could not consider the truth or falsity of the writing, the jury acquitted Zenger, believing that he had printed the truth and should not be

convicted.39

As exemplified by the Zenger trial, the independence of the jury emerged as a central value of liberty in the new American republic. As one commentator has noted: “The proponents of the jury’s power and right to nullify the law suggest that juries have traditionally had that power and right. The nullification power was explicit in the American courts until the 1850s.”40 Even as late as 1910, Harvard Law School’s eminent Dean Roscoe Pound wrote: “Jury lawlessness is the greatest corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers.”41

There subsequently arose a more formalistic, anti-nullification view, as articulated by the Supreme Court in Sparf v. United States.42 In Sparf, which arose from a murder trial, the trial court had refused to comply with the jury’s request for instructions on the “lesser” charge of manslaughter because, while the evidence supported a murder conviction, it did not support a manslaughter conviction. While the jury apparently did not believe that it could acquit entirely, its request for instructions as to manslaughter showed that it was considering exercising leniency by convicting of the lesser offense, notwithstanding its legal inapplicability to the scenario at issue. The Supreme Court held that the trial judge had not erred in refusing the jury’s request. The Sparf court read Bushell’s Case narrowly — not as explicitly permitting jurors to nullify based on their personal view of the law, but merely as holding that Bushell could not be punished because “it could never be proved” that his refusal to convict was based upon his disregard of the law (which would have been impermissible), rather than his personal view of the evidence (which would have been permissible, however questionable).43 The Sparf court’s holding followed from its fear that “[p]ublic and private safety alike would be in peril if the principle [were] established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves.”44

This anti-nullification view was expressed once again in Horning v. District of Columbia,45 where the Supreme Court gave its approbation, over the dissent of Justice Brandeis, to the trial judge’s jury instruction that “a failure by you to bring in a [guilty] verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law. …”46 Hewing to its formalistic approach, the majority opinion in Horning stated: “In [a case where the facts are not in dispute,] obviously the function of the jury if they do their duty is little more than formal.”47 While the Supreme Court recognized that the trial judge had “[p]erhaps [displayed] a regrettable peremptoriness of tone” in his comments on potential jury nullification, it concluded that “[i]f the defendant suffered any wrong it was purely formal since … on the facts admitted there was no doubt of his guilt.”48 In disagreeing with this view of the role of the jury, Brandeis retorted that “[w]hether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution, a mere formality,” and opined that “the presiding judge [had] usurped the province of the jury. …”49

The debate over the efficacy and acceptance of jury nullification has animated the circuit courts. In United States v. Dougherty,50 Judge Leventhal, writing for the D.C. Circuit, traced the evolving attitude toward jury nullification reflected in American jurisprudence. He noted that “in colonial days and the early days of our Republic [there were a] variety of expressions … from respected sources — John Adams; Alexander Hamilton; prominent judges — that jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power signified a right; that they were judges both of law and of fact in a criminal case, and not bound by the opinion of the court.”51 However, he continued, “[a]s 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 make its own law, but in following democratic processes for changing the law.”52

Sparf was the natural end point of this evolution, Leventhal wrote, establishing that “[t]he jury’s role was respected as significant and wholesome, but it was not to be given instructions that articulated a right to do whatever it willed.”53 Judge Leventhal concluded that juries ought not be advised of their power of nullification, as “its explicit avowal risks the ultimate logic of anarchy”;54 as for the occasional exceptional case where nullification was indeed appropriate, he believed that “[t]he totality of input [from literature, media, word of mouth, history and tradition] generally convey[s] adequately enough the idea of … freedom in an occasional case to depart from what the judge says,” such that instructions to that end

were not necessary.55 Judge Bazelon, in dissent, criticized as "sleight-of-hand" the practice of intentionally hiding the right of nullification — the existence of which the majority had acknowledged — from the jury.56

The Second Circuit, whose precedents I am bound to follow, has perhaps taken the hardest line against jury nullification. In sanctioning the removal of a juror during deliberations for wishing to acquit despite believing that the defendant was guilty, Judge Cabranes, writing for a unanimous court in United States v. Thomas, explicitly held that trial courts "have the duty to forestall or prevent" nullification by dismissing jurors who are reported during deliberations to be determined to acquit despite the evidence.57 Departing from the D.C. Circuit's view in Dougherty, the Second Circuit "categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is [ever] desirable or that courts may permit it to occur when it is within their authority to prevent."58 While nullification was a "de facto power" of the jury, it was not a "right," and in fact was "a violation of a juror's sworn duty to 'apply the law as interpreted by the court.'"59 Accordingly, the Second Circuit held that "it would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath," and that "a presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge" either during the trial or during deliberations.60

In my district, the eminent Judge Jack Weinstein (whose courtroom sits next to mine) has recently articulated his view on the issue:

> In spite of the recent trend towards discharging jurors who may nullify — a particular problem with the selection of jurors in capital cases — I am hesitant to dismiss intelligent prospective jurors. … Concerns about jury nullification are largely unwarranted. Differences about evaluation of the facts based on differing life experiences ought not to be mistaken for nullification. There is some tendency to nullify based on conscience or individual circumstances in the face of laws a juror believes to be unjust. In my courtroom, I do not instruct juries on the power to nullify or not to nullify. Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested. I do believe, however, that judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values. Judge Bazelon was correct when he wrote: "I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine."61

Unlike Judge Weinstein, I have reflexively incorporated into my jury instructions what can only be viewed as an anti-nullification charge: "You should not be concerned about the wisdom of any rule I state. Regardless of any opinion that you may have as to what the law may be or ought to be, it would violate your sworn duty to base a verdict on any view of the law other than that which I give you." Obviously this instruction did not deter the juries from acquitting in my gun possession cases, but nonetheless, Judges Weinstein's and Bazelon's insightful rationales — and the story of that Marine amputee — have given me pause to wonder whether I should refrain from giving this charge in the future and simply tell the jury, as I always do, that "You must accept my instructions of law and apply them to the facts as you determine them."62

Judicial Nullification

Judge Weinstein's belief "that judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values" raises the issue of judicial nullification. While Judge Weinstein's statement seems conceptually at odds with the Second Circuit's admonition in Thomas that "jury nullification is [never] desirable" and that judges "may [not] permit it to occur when it is within their authority to prevent," in the real world of the trial judge, the overarching "interests of justice" is the internal compass that dictates the exercise of the judge's relevancy and prejudice assessments under Fed. R. Crim. P. 403. While this may be in tension with anti-nullification notions, in applying the elastic concept of the interests of justice in making

evidentiary rulings, the trial judge is adhering to the finest time-honored tradition of the law.

In that regard, I could not help but recall that many years ago I learned that as far back as 1849, the drafters of New York State's Code of Criminal Procedure recommended in their report to the legislature that, in addition to the traditional right of the district attorney to order a nolle prosequi, the court should be able to dismiss a criminal proceeding sua sponte, finding it undesirable that courts previously lacked the ability, "no matter how unjust … the continuance of the indictment against the defendant, to relieve him from the injustice until the district attorney chooses to consent that it do so."63 Their recommendation became the law in 1881, when the proposed Code was enacted, providing, in that respect, that "[t]he court may either of its own motion, or upon the application of the district attorney and in the furtherance of justice, order an action after indictment to be dismissed."64 It was not until the 1973 case People v. Clayton,65 however, that the substantive standards for assessing when an indictment can be dismissed sua sponte by the court in the interests of justice were established. "Clayton hearings" thereupon became, and remain to this date, part of the lexicon of the criminal law in New York.66

I remember this well because I represented Robert Clayton in post-conviction proceedings during the early 1970s challenging the voluntariness of his confession, and the proceedings leading to the dismissal of his murder indictment. Clayton was a migrant laborer who had been convicted by a jury in the early 1950s for murdering a co-worker during a drunken brawl; he was sentenced to 30 years to life. As a result of the Supreme Court's decision years later in Jackson v. Denno,67 he was afforded a hearing to challenge the voluntariness of his confession, which was found to have been involuntary — two decades after he had been convicted.68 Instead of retrying Clayton without the confession — a difficult cup of tea after the passage of so much time — the D.A. offered him a plea deal to the reduced charge of manslaughter which, with credit for time served, was tantamount to his immediate release. Much to my surprise, however, Clayton refused the offer, telling me that he had adjusted to life in jail and that unless he came out with a clean slate he did not think he could make it back into society.

I got to know Clayton and came to suspect that the fight with his co-worker was not his fault, and that he did not intend to kill the co-worker. But what to do with the indictment? When the D.A. told the judge that he would retry Clayton, the judge invoked that old 1881 statute, and dismissed the indictment in "the furtherance of justice." Startled that a judge could dismiss a murder indictment on his own initiative in the interests of justice, the D.A. appealed. While affirming the power of the judge to do so, the appellate court, after establishing the substantive standards to be applied, remanded for the first Clayton hearing in the state.69 At the hearing, the judge was satisfied that I had presented sufficient evidence that Clayton satisfied the newly announced substantive standards, and once again dismissed the indictment in the interests of justice.

In thinking about the notion of judicial nullification in writing this article, I read again the article I wrote for the New York State Bar Journal about the Clayton case back in 1973, about 20 years before I was appointed to the federal bench. I wrote then that it was "thoroughly refreshing … to find an occasional reaffirmation, such as manifested by the Clayton case, that it is, after all, the principle of 'justice' which is the hallmark of our jurisprudence"; that "the letter of the law is not the final word"; and that the appellate court in Clayton "ha[d] set in motion new machinery to allow for the screening of criminal cases with a view to dismissal prior to trial for reasons transcending the defendant's guilt or innocence."70 Clayton hearings are seldom granted, but the power conferred upon the judges of New York State to do so where indicated in furtherance of justice reflects the legislature's confidence that the state's judges can be trusted to be the ultimate guardians of justice and fairness.

To be sure, if there were a federal counterpart to New York's statutory scheme, that Marine amputee would probably not have had to look to the jury to countermand the prosecutor's decision to prosecute him. However, presently, federal trial judges can only reflect upon the interests of justice where they are empowered to exercise discretion in making evidentiary rulings; on a practical level, notions of fairness may also be at play when deciding whether there is substantial evidence to allow a case to go to a jury.71 But, should not federal law recognize, as New York State does, that in a worthy exceptional case, "the letter of the law gracefully and charitably [should] succumb to the spirit of justice," and entrust its trial judges with the responsibility to determine, under standards similar to those laid down in Clayton, when

such a case exists?72

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Notes

1. See Death Penalty Information Center, Death Penalty Policy by State, http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited Apr. 6, 2009).
2. 18 U.S.C. § 922(q)(1)(D). To date, a singular exception to the gun/interstate commerce hook is the Supreme Court's holding in United States v. Lopez, 514 U.S. 549 (1995), that the Gun-Free School Zones Act, which made it a federal offense for any individual to knowingly possess a firearm at a place that the individual knows or has reasonable cause to believe is a school zone, exceeded the Commerce Clause authority of Congress since possession of a gun in a local school zone was not economic activity that substantially affected interstate commerce. The Supreme Court subsequently acknowledged that Lopez was the rare case, see Gonzalez v. Raich, 545 U.S. 1, 22 (2005); thus, even though, in theory, the prosecutor must prove that the gun (or component part) traveled (or affected) interstate commerce, this element is rarely contested.
3. See 18 U.S.C. § 922(j).
4. See 18 U.S.C. § 922(k).
5. See 18 U.S.C. §922(o). Machine guns are defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." See 26 U.S.C. § 5845(b).
6. See 18 U.S.C. § 922(p).
7. See 18 U.S.C. § 922(g).
8. See 18 U.S.C. § 924(c)(1)(A).
9. See 18 U.S.C. § 922(x).
10. Until 2004, the possession of "assault weapons" — i.e., semi-automatic rifles, pistols and shotguns that had certain combinations of military-style features, such as detachable magazines, telescoping stocks, bayonet mounts, etc. — was universally banned under federal law. See Pub. L. No. 103-322, 108 Stat. 1796 (1994). At that time, however, this proscription was allowed to expire amid great political controversy. See Sheryl Gay Stolberg, Efforts to Renew Weapons Ban Falters on Hill, N.Y. Times, Sept. 9, 2004, available at http://www.nytimes.com/2004/09/09/politics/09ban.html?_r=1&scp=1&sq=assault%20weapons%20ban&st=cse (last visited Apr. 8, 2009). Recently, after semi-automatic assault rifles were used to spray more than 50 bullets into a St. Petersburg, Fla., home in a gang-motivated incident, killing an eight-year-old girl, an editorial in the local newspaper urged Congress to re-institute the federal assault weapons ban, noting that such weapons "have no practical use for hunting, but … are highly efficient tools [of gang warfare" and are "the hot weapon[s] of choice for … drug gangs." Why Is This Gun Legal?, St. Petersburg Times, Apr. 11, 2009 at 8A. St. Petersburg's police chief agreed, opining that semi-automatic assault rifles "don't belong on any city street in America." Id.
11. Pub. L. 90-618, 82 Stat. 1213 (1968).
12. Pub. L. 103-159, 107 Stat. 1536 (1993).
13. The Brady Act required state and local law enforcement officials to perform the background checks; however, the Supreme Court, in Printz v. United States, 521 U.S. 898 (1997), held that this violated the Tenth Amendment. In its place, the National Instant Criminal Background Check System (NICS) was established, calling for the FBI to fill the void.
14. John Rosenthal, Close the Gun Show Loophole, Boston Globe, Aug. 16, 2008, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/08/16/close_the_gun_show_loophole/ (last accessed Apr. 6, 2009).
15. It remains to be seen whether the Supreme Court's decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), holding that the District of Columbia violated the Second Amendment in banning possession of an operable handgun in the home for purposes of self-defense, will also apply to the states, as Heller did not address the question of whether the Second Amendment was incorporated under the Fourteenth Amendment as against the states. The holding only concerned the Second Amendment as

applied directly to the District of Columbia, a federal enclave.
16. See Brady Campaign to Prevent Gun Violence, 2008 Brady Campaign State Scorecard, http://www.stategunlaws.org/
xshare/pdf/scorecard/2008/2008_state_scorecard.pdf (last visited Apr. 6, 2009). Many of these weapons were federally banned prior to 2004. See also supra note 10.
17. See Pennsylvanians Against Trafficking Handguns, What Is a "One-Handgun-Per-Month Law, and Why Is It Important?," http://www.bradynetwork.
org/site/DocServer/PATH_FAQ.pdf?docID=361 (last visited Apr. 6, 2009).
18. See 18 U.S.C. § 922(x).
19. See Open Society Institute, Gun Control in the United States: A Comparative Survey of State Firearm Laws at 1 (hereinafter "Gun Control in the United States"), April 2000, http://www.soros.org/initiatives/
usprograms/focus/justice/articles_publications/publications/gun_report_20000401/GunReport.pdf (last visited Apr. 6, 2009).
20. See id. at 1, 4; see also Legal Community Against Violence, Minimum Age to Purchase and Possess Firearms, http://www.lcav.org/content/minimum_age_purchase_possess.pdf (Feb. 2008) (listing minimum age requirements to purchase and possess firearms in each state).
21. See N.Y. Penal Law § 400.00. New York State also prohibits additional categories of weapons not prohibited by the federal statute. See N.Y. Penal Law
§§ 265.00, 265.01, 265.20.
22. See N.Y.C. Admin. Code § 10-303.
23. See Gun Control in the United States, supra note 19, at 3.
24. See Nat'l Rifle Ass'n Inst. for Legis. Action, Guide to the Interstate Transportation of Firearms, available at http://www.nraila.org/GunLaws/Federal/Read.aspx?id=59 (last visited Apr. 3, 2009).
25. See 18 U.S.C. § 926A.
26. Id.
27. See Gun Control in the United States, supra note 19, at 1.
28. See Charles M. Blow, Pitchforks and Pistols, N.Y. Times, Apr. 4, 2009, at A19, available at http://www.nytimes.com/2009/04/
04/opinion/04blow.html?scp=1&sq=
pitchforks%20and%20pistols&st=cse (last accessed Apr. 8, 2009).
29. See Brady Campaign to Prevent Gun Violence, Gun Violence Statistics and Studies, http://www.bradycampaign.org/issues/gvstats/firearmoverview/ (last accessed Apr. 6, 2009).
30. See id.
31. See Gun Control in the United States, supra note 19, at 1.
32. See Bob Herbert, A Culture Soaked in Blood, N.Y. Times, Apr. 25, 2009, at A19.
33. See Bob Herbert, The American Way, N.Y. Times, Apr. 14, 2009, at A23.
34. Herbert, supra note 32.
35. See Keith L. Alexander, Marine Amputee Acquitted on Gun Possession Charges, Wash. Post., Jan. 14, 2009, at B1, available at http://www.washingtonpost.com/wp-dyn/
content/article/2009/01/13/AR2009011302840.html (last visited Apr. 8, 2009).
36. 24 Eng. Rep. 1006 (C.P. 1670), 6 How. State Tr. 999, available at: http://www.
constitution.org/trials/bushell/bushell.htm.
37. Id.
38. Id.
39. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger (1736), available at: http://www.
courts.state.ny.us/history/elecbook/zenger_tryal/pg1.htm (last accessed Apr. 8, 2009).
40. See Irwin A. Horowitz, Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision-Making, 14 L. & Hum. Behav. 440 (1988).
41. Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910).
42. 156 U.S. 51 (1895).
43. Id. at 91.
44. Id. at 101. Two dissenting justices opined that "[i]t [was their] deep and settled conviction … that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." Id. at 114 (Gray, J., dissenting).

45. 254 U.S. 135 (1920).
46. Id. at 138.
47. Id. at 138.
48. Id. at 138-39. The court did grudgingly acknowledge that "the jury were allowed the technical right, if it can be called so, to decide against the law and the facts," id. at 139, though its uncharitable description of this "technical" right, and its holding that the defendant had not been prejudiced, made clear that it did not hold it in high esteem.
49. Id. at 140 (Brandeis, J., dissenting).
50. 473 F.2d 1113 (D.C. Cir. 1972).
51. Id. at 1132.
52. Id.
53. Id. at 1133.
54. Id.
55. Id. at 1135.
56. Id. at 1140 (Bazelon, J., dissenting).
57. 116 F.3d 606, 616 (2d Cir. 1997).
58. Id. at 614.
59. Id. at 615-16; see also People v. Goetz, 73 N.Y.2d 751, 752 (1988) (stating that "[w]hile there is nothing to prevent a petit jury from acquitting although finding that the prosecution has proven its case, this so-called 'mercy-dispensing power' … is not a legally sanctioned function of the jury and should not be encouraged by the court.").
60. Id. at 616-17. Recently, the Second Circuit reiterated Thomas's anti-nullification stance in United States v. Polouizzi, ___ F.3d ____, 2009 WL 1098796 (2d Cir. 2009), stating that "it is not the proper role of courts to encourage nullification," id. at *18 (citing Thomas, 116 F.3d at 615); the court noted, however, that in rare cases, "instructing the jury on the consequences of its verdict … [may] better discourage nullification," such as where a prosecutor incorrectly states that a defendant "would 'go free' if found [not guilty by reason of insanity]. …" Id. at *17 (quoting Shannon v. United States, 512 U.S. 573, 587 (1994) (emphasis added) (alteration in Polouizzi)).
61. Jack B. Weinstein, The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture, 30 Cardozo L. Rev. 1, 121-22 (2008) (quoting Dougherty, 473 F.2d at 1142 (Bazelon, J., dissenting)) (internal quotation marks and footnotes omitted).
62. In a similar vein, Judge Weinstein's standard charge, although not containing the explicit anti-nullification instruction that I have in the past given, states: "I will instruct you now on the law. It is your duty as jurors to follow these instructions. . . . You will decide the case based solely on the evidence before you and according to the law as I instruct you."
63. Final Report of Criminal Code, New York Commissioners on Practice & Pleadings, Dec. 31, 1849, at 343 (available at the New York State Law Library, Education Building, Albany, New York).
64. N.Y. Code Crim. P. § 671 (1881) (now N.Y. C.P.L. § 210.40).
65. 41 A.D. 2d 204 (2d Dep't 1973).
66. The non-exclusive considerations that the appellate court in Clayton thought applicable were "(a) the nature of the crime, (b) the available evidence of guilt, (c) the prior record of the defendant, (d) the punishment already suffered by the defendant, (e) the purpose and effect of further punishment, (f) any prejudice resulting to the defendant by the passage of time, and (g) the impact on the public interest of a dismissal of the indictment." 41 A.D.2d at 208. In 1979, C.P.L. § 210.40 was amended to codify the factors that the legislature thought it proper for courts to consider: "(a) the seriousness and circumstances of the offense; (b) the extent of harm caused by the offense; (c) the evidence of guilt, whether admissible or inadmissible at trial; (d) the history, character and condition of the defendant; (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant; (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; (g) the impact of a dismissal upon the confidence of the public in the criminal justice system; (h) the impact of a dismissal on the safety or welfare of the community; (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; [and] (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose." L.1979, ch. 216, § 1, eff. Jan. 1, 1980.
67. 378 U.S. 368 (1964).
68. See United States ex rel. Clayton v. Mancusi, 326 F. Supp. 1366, aff'd. sub nom. Mancusi v. United

States ex rel. Clayton, 454 F.2d 454, cert. denied sub nom. Montanye v. Clayton, 406 U.S. 977 (1972).
69. See 41 A.D.2d at 207-08.
70. See Frederic Block, The Clayton Hearing, N.Y. State Bar Journal, October 1973, at 411, 412. Indeed, these transcendent thoughts were encapsulated in Clayton, where the court, in viewing the history of the interest of justice statute, explicitly noted "that the use of the statute depended only on principles of justice, not on the legal or factual merits of the charge or even on the guilt or innocence of the defendant." 41 A.D.2d at 207 (citation omitted).
71. See Fed. R. Crim. P. 29(a) ("After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."). Such a judgment of acquittal is not appealable by the government. See Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that the Double Jeopardy Clause of the Fifth Amendment is violated "when [a] court of appeals set[s] aside [a pre-verdict] judgment of acquittal and direct[s] that [a defendant] be tried again for the same offense"); see also Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 433-34 (1994) (noting that a judgment of acquittal under Rule 29(a) is the only district court ruling in all of federal jurisprudence "that is both absolutely dispositive and entirely unappealable").
72. People v. Rickert, 58 N.Y.2d 122, 126 (1983) (quoting People v. Davis, 286 N.Y.S.2d 396, 400 (Sup. Ct. N.Y. County 1967)). Under the current federal rules, the "interest of justice" standard appears in Fed. R. Crim. P. 33, which allows the court to vacate a jury's verdict and grant a new trial "if the interest of justice so requires." As the Second Circuit recently held, however, a trial judge may not grant a new trial under Rule 33 merely because the jury might have nullified had it been informed of certain facts (e.g., the existence of a mandatory minimum sentence). See United States v. Polouizzi, ___ F.3d ____, 2009 WL 1098796, at *18 (2d Cir. 2009) ("A trial court's failure to take discretionary steps that might have induced jurors to nullify does not furnish an adequate justification for a finding under [Fed. R. Crim. P.] 33 that 'the interest of justice . . . requires' a new trial.").

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