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Federal Judge Advocates Jury Nullification After Being Shocked by Overzealous Child Pornography Prosecution

It just makes sense to let jurors know about their already established power to exercise discretion over bad laws and ill-considered prosecutions.

By J.D. Tuccille

"This is a shocking case. This is a case that calls for jury nullification."

Many have had similar reactions when confronting cases involving authorities running roughshod over people with bad laws, punitive sentences, and ill-considered prosecutions. But this time, the person invoking jury nullification was a federal judge—District Judge Stefan R. Underhill of the District of Connecticut—and he spoke in court about a case over which he presided.

The prosecution that shocked Underhill involves Yehudi Manzano, a 30-something man charged with producing and transporting child pornography after saving, and then deleting, a video of his teenage sex partner to and from his own phone and its associated Google cloud account. "The only people who ever saw it were the guy who made it, the girl who was in it, and the federal agents," Norman Pattis, Manzano's attorney, told me.

> "Juries exist for a reason," [Norm] Pattis argued in court. "They stand between the government and the accused, and they provide the accused with an opportunity to hold the government to its burden of proof. And in certain trials in our history, juries have done more than that. They've said the law is wrong, and we, the people, say it's wrong."

But that, prosecutors say in the indictment, was enough for the federal government to proceed with charges under the assumption that Manzano acted "knowing and having reason to know that: such visual depiction would be transported and transmitted using any means and facility of interstate and foreign commerce." And that's important, because the mandatory minimum sentence under federal law for recording video of sex with an underage partner is 15 years.

That draconian sentence—independent of what was in store in the entirely separate state trial for sex with a minor—was too much for Judge Underhill. "I am absolutely stunned that this case, with a 15-year mandatory minimum, has been brought by the government," he said in

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court. "I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct, and it is extremely unfortunate that the power of the government has been used in this way, to what end I'm not sure."

Judge Underhill acknowledged that he's not allowed to encourage jury nullification, but "if evidence comes in about the length of the sentence, or if Mr. Pattis chooses to argue, I do not feel I can preclude that. I don't feel I'm required to preclude that. And I think justice requires that I permit that."

The judge's appeal to jury nullification as a remedy for runaway prosecution didn't come out of the blue. Defense counsel and prosecutors had already sparred over the case's rather tenuous connection to interstate commerce, by which the federal government claimed jurisdiction.

"Apparently, the mere fact that the recording equipment was manufactured outside Connecticut is sufficient to meet the interstate commerce requirement of the statute," Judge Underhill noted in surprise. They also tussled over the extent to which jurors should be informed of the long years in prison that awaited Manzano upon conviction.

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In response to that, Neeraj N. Patel bluntly told the court on behalf of the U.S. Attorney's office, "you should take steps to prevent jury nullification and not inform the jury of the sentencing consequences."

Normally, that's where the matter would have remained. Judges don't generally want jurors told they can pull the plug on a prosecution because they don't like the law or the possible sentence. They're generally not permitted to inform juries about nullification, and they're discouraged from informing juries about the consequences in store for convicted defendants.

However, that doesn't mean judges must ban all discussion of jury nullification and sentencing from trials. And occasionally you run across one who is horrified by what prosecutors have in mind. That's why Pattis, who passionately believes in the right to nullification, keeps arguing for a principle that generally gets shot down in court. And last week, he found a judge sympathetic with his arguments.

The U.S. Attorney's Office for the District of Connecticut declined to comment on this case, but did provide me with a copy of the emergency motion it filed seeking a stay in the trial. Prosecutors want time to get a higher court to prevent Judge Underhill from allowing Manzano's defense counsel to inform jurors of the potential sentence and argue for jury nullification.

"To the extent the Court's rulings allow Mr. Manzano to make argument and elicit evidence that invites jury nullification, the Government seeks mandamus to have the Court preclude such argument and evidence," prosecutors warn. "Finally, the Government may seek mandamus to have the Court instruct the jurors that they have a duty to convict if it finds the Government has proven Mr. Manzano's guilty beyond a reasonable doubt, regardless of the sentencing consequences," they add.

At the subsequent hearing, Judge Underhill denied that he'd issued any order that would justify mandamus in the case, and emphasized that he intended to instruct jurors to disregard their own feelings about the law or the sentence. But he also added, "if Mr. Pattis is not allowed to argue jury nullification, in my view there is a risk of a Sixth Amendment violation here." His intent, it seems, is to allow the jury to navigate their own way between his instructions and any

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twinges of conscience drawn out by information presented to them by Manzano's attorney. Nevertheless, he granted the government's motion for a stay and dismissed the jury.

Whether the jurors who ultimately decide Manzano's fate in this case are fully informed about the consequences of their decision or their power in the court is up in the air. We know that at least one federal judge wants them to have that knowledge—and for good reason, I'd argue.

"We have a country coming apart at the seams and we're worried about the legitimacy of institutions. Under the circumstances, why wouldn't you empower juries?" Pattis said to me during our discussion of the case.

Why wouldn't you, indeed. At a moment when Americans harbor near-historic levels of distrust in government, it just makes good sense to let jurors know about their already established power to exercise discretion over bad laws and ill-considered prosecutions. ■