

Juries are permitted to deliver stupid verdicts. They can believe the wrong people, accept ridiculous testimony while rejecting the obviously true. They cannot, however, square a circle.

Therefore, some verdicts will arguably be repugnant. A verdict is repugnant when it is logically inconsistent, not when it's factually stupid. In other words, a combination of convictions and acquittals will be legally unacceptable when, no matter what evidence the jury might have accepted or rejected, this combination is impossible to reconcile with itself. A verdict is repugnant if an acquittal on one charge conclusively negates a necessary element of a crime for which the defendant was convicted (*People v Tucker*, 55 NY2d 1 [1981]). A verdict is also repugnant/inconsistent if the defendant is convicted of two counts which effectively find differing mental states as to the same act (*People v Gallagher*, 69 NY2d 525 [1987] [the same murder cannot be both intentional and depraved]).

Few verdicts are actually repugnant. If the jury could find a reasonable doubt as to the element of one crime, e.g. assault, without necessarily finding a reasonable doubt as to another crime, e.g. robbery, then acquittal on the first is not repugnant even if there is a conviction on the second. It might be stupid, if the robbery allegations seem to be entirely dependent on and peripheral to the existence of the assault, but that is not the same as legally inconsistent. The jury can accept some and reject testimony which is part of the same sentence, though I do not believe that it can accept a fact for one purpose and reject it for another. The evaluation is much like a rule against perpetuities problem. If you can imagine a combination of findings which permit the verdict, it's permissible.

A verdict which includes one more more acquittals and is ruled to be repugnant will result in the jury reconsidering those acquittals. CPL 31.50(2) provides that if the jury renders a verdict which is legally defective then the court “must explain the defect or error and must direct the jury to reconsider such verdict”. Therefore, dealing with repugnance is a two step process. One, is the verdict repugnant? Two, is your client better off if you keep your mouth shut? The best way to deal with a complex case is to consider, while the jury is out, what combination of verdicts might be repugnant, and whether you want to object. That way you're not scrambling to make the calculation in a rush. Failing that, request a brief delay in releasing the jury so that you can consider your options.

This is why a claim that the verdict is repugnant must be raised before the jury is discharged to preserve the claim. Where there is no timely objection, the assumption is that defense counsel made a strategic choice not to raise repugnance.

Finally, repugnance is not tested by referring to what the law actually requires, it is tested by referring to the law as it was given to this jury, even if the charge was erroneous (*People v Green*, 71 NY2d 1006 [1988]).