The Duty to Disregard the Law

Abstract: In the practice of jury nullification, a jury votes to acquit a defendant in disregard of the factual evidence, on the grounds that a conviction would result in injustice, either because the law itself is unjust or because its application in the particular case would be unjust. The practice is widely condemned by courts, which strenuously attempt to prevent it. Nevertheless, the arguments against jury nullification are surprisingly weak. I argue that, pursuant to the general ethical duty to avoid causing unjust harms to others, jurors are often morally obligated to disregard the law.

1. The Question of Nullification

In 1735, John Peter Zenger, then publisher of the *New York Weekly Journal*, was put on trial for seditious libel as a result of a series of articles the newspaper had published attacking the governor of New York. During the trial, Zenger's attorney freely admitted that Zenger had published the material in question. His defense was that the material was all in fact *true*. When the prosecutor refused to provide any evidence that the material was false, the defense offered to prove that it was all true. The judge, however, prohibited the defense from offering any such evidence. The prosecutor had argued that the factual accuracy of Zenger's allegations was irrelevant to the charge of libel; indeed, it was *worse* to publish accurate criticisms of public officials than false ones, because accurate criticisms were more likely to undermine public confidence in the government. The judge instructed the jury that the prosecutor was correct as to the law: British law did not recognize truth as a defense to a charge of libel. Therefore, the judge all but ordered the jury to find the defendant guilty. But the jury defied the judge and the law and returned a verdict of not guilty. Zenger was freed, and the American tradition of freedom of the press was born.[1]

Thus transpired one of history's most famous and consequential instances of *jury nullification*, the practice wherein a jury chooses to disregard the law and vote on the basis of their conscience. Sometimes, the jury considers the law itself unjust; other times, the jury may accept the law in general but believe that its application in the particular case at hand would be unjust. Many other cases of suspected jury nullification have occurred since the Zenger trial.

[1]Zenger 1736; Linder 2001.

Before the American Civil War, northern juries frequently voted to acquit defendants who were prosecuted for assisting runaway slaves. During the Prohibition era, juries frequently acquitted defendants for alcohol crimes. More recently, Dr. Jack Kevorkian was acquitted three times of charges of assisted suicide. Today, jury trials for drug charges in the United States sometimes result in hung juries, due to widespread opposition to the nation's drug laws.[2]

Judicial opinion, however, tends to be aggressively opposed to the practice of jury nullification. Judges attempt to screen out jurors who might be prone to nullification, require jurors to swear to apply the law as given to them by the judge, and prohibit defense attorneys from hinting at the possibility of nullification. Jury members whose intention to nullify is revealed before the conclusion of the trial may be removed from the jury.[3]

Most of the existing literature on jury nullification is written by judges or legal scholars and addresses legal questions concerning how courts may react to jurors who nullify or intend to nullify–for example, may a judge remove such jurors from the jury? May a judge falsely instruct jurors that they lack the power to nullify? These questions are chiefly addressed through citation of legal precedents.

The present essay addresses a question of individual ethics: If one is on a jury, and one comes to believe that the defendant is being prosecuted for an act that, though contrary to written law, *was not wrong*, should one nullify the law by voting to acquit?

2. Nullification and Duties of Justice

2.1. Some Illegal Acts Are Morally Blameless

The kind of jury nullification with which I am concerned occurs when a defendant is prosecuted for an act that was *illegal but morally blameless*. Almost everyone admits that there are such acts. During World War II, some German citizens illegally hid Jews to protect them from persecution by the Nazis. In the pre-Civil War era, some Americans illegally helped slaves to escape from their masters via the Underground Railway. During the 1960's, some Americans illegally burned their draft cards in protest of the Vietnam War. All of these actions were not only blameless but positively praiseworthy.

---

[2]On cases that have incurred jury nullification, see Leipold 1996, pp. 297-8; Biskupic 1999; Bork 1999, p. 20.

[3]Cabranes 1997; George 2001.

It is sometimes thought that such cases are very rare. If so, the present discussion might be of little import to the actual conduct of juries, however correct my central contentions might be. I shall therefore briefly mention two reasons to think that in fact, blameless lawbreaking is likely to be fairly common.

First, the view that individuals lack any general, content-independent duty to obey the law has in recent decades become a well-regarded, if not orthodox position in political philosophy.[4] Philosophers attempting to defend a general duty to obey the law have found the task extremely difficult, and the most influential traditional account of this duty, the social contract theory, is now widely recognized as untenable. Recent theories of political obligation are vague, speculative, and increasingly recondite. This situation has come about, not as a result of some anti-authority bias on the part of political philosophers, but rather *in spite of* a widespread desire on the part of political philosophers to defend the authority of government.

Second, even those who defend the notion of a general duty to obey the law defend only a *prima facie* duty, and not one that appears extremely strong. The duty to obey the law has been said, for example, to arise out of an obligation to avoid free riding, to treat other citizens as equals, or to promote just institutions in one's society.[5] While each of these obligations has some intuitive force, none appear to be exceptionally powerful and difficult to override.

Be that as it may, I shall not attempt here to delineate the range of cases in which illegal behavior is ethically permissible. Hereafter, I shall simply assume that a jury is to decide a criminal case in which the defendant has committed an illegal but ethically blameless act.

2.2. The Duty to Refrain from Causing Unjust Harm

Imagine that you are walking down a public street with a flamboyantly-dressed friend, when you are accosted by a gang of gaybashing hoodlums. The leader of the gang asks you whether your friend is gay. You have three alternatives: you may answer yes, refuse to answer, or answer no. You are convinced that either of the first two choices will result in a beating for your friend. However, you also know that your friend is in fact gay. Therefore, how should you respond?

This is hardly an ethical dilemma. Clearly, you should answer no.

---

[4]See Simmons 1979; Huemer 2013.

[5]Klosko 2005; Christiano 2008; Rawls 1999, section 19.

No person with a reasonable and mature moral sense will have difficulty with this case. Granted, it is usually wrong to lie, but the importance of avoiding inaccurate statements pales in comparison to the importance of avoiding serious and unjust injury for your friend. The case illustrates a simple and uncontroversial ethical principle: it is prima facie wrong to cause another person to suffer serious undeserved harms. This is true even when the harm would be directly inflicted not by oneself but by a third party. Indeed, it may be one's positive duty to prevent such harms, when one can do so at trivial cost.

The duty to avoid contributing to serious, unjust harms may perhaps be overridden in extreme cases, but it is not easily overridden. It would not be just, for example, to punish an innocent man to prevent an angry mob from rioting, even if one believed the riots would cause considerably greater harm than the punishment the innocent defendant would suffer.[6] This suggests that the right not to be unjustly punished is overridden, if at all, only by very serious considerations.

2.3. The Simple Argument for Nullification

The gaybasher case appears analogous to the jury nullification case. By stipulation, we are considering the case of a morally blameless defendant, who therefore does not deserve punishment. On the face of it, undeserved punishment constitutes an unjust harm. In most cases of interest, judicial punishment will be much more harmful than a beating, involving months or years of forced confinement in dangerous and extremely unpleasant conditions. Therefore, a juror has, if anything, a much stronger reason to avoid causing the blameless defendant to be judicially punished than you have to avoid causing your friend to be beaten by hoodlums. A jury that votes to convict a defendant can predict that this will result in judicial punishment of the defendant, even more surely than you could predict the violence your friend would suffer at the hands of the hoodlums in the above example. Therefore, the jury should not vote to convict. Just as you should tell the hoodlums your friend is not gay, the jury should tell the state that the defendant is not guilty. Whether the "not guilty" verdict should be construed as a lie is immaterial, since the imperative of avoiding serious unjust harms is of far greater import than the

[6]McCloskey 1957; 1963.

relatively trivial imperative to avoid making inaccurate statements.[7]

In short, there is a simple and obvious argument for jury nullification:

1. It is prima facie wrong to cause unjust harm to others.
2. To convict a defendant for a morally blameless violation of law is to cause unjust harm to that defendant, for:
   a. To convict a defendant is to cause the defendant to be punished.
   b. One does not deserve punishment for a morally blameless act.
   c. Undeserved punishment is an unjust harm.
3. Therefore, it is prima facie wrong to convict a defendant for a morally blameless violation of law.

This argument establishes not only an entitlement but a *duty* of jury nullification in cases of blameless law-violations. This is no trivial or easily overridden duty, for it derives directly from the duty to avoid causing unjust harms. The more serious an unjust harm is, the stronger is the moral duty to avoid bringing it about. Since judicial punishments are typically very serious harms, the duty of jury nullification, when it comes into play, is typically a very weighty duty.

3. The Rickety Case against Nullification

Given the simple and powerful ethical grounds for jury nullification, the strident opposition of judges may come as something of a surprise. Judges, often seen as authorities on justice and the justice system, have called jury nullification "pernicious," "intellectually bankrupt," and "indefensible."[8] This initially suggests that judges must know some very powerful arguments against the practice. As will emerge in this section, however, the arguments against jury nullification turn out to be surprisingly shaky, providing little reason for jurors to refrain from nullifying and almost entirely failing to address the main argument in favor of nullification.

---

[7]Matravers (2004, pp. 74-6) suggests that a nullifying jury might be interpreted, not as dishonestly reporting that the defendant did not violate the law, but as sincerely reporting that the defendant did not do anything deserving of the punishment attached to the law in question. This view renders nullification even more easily justifiable.

[8]Bork 1999, p. 20; Steigmann 1998; Biskupic 1999, quoting D.C. Superior Court Judge Henry F. Greene.

3.1. Violation of the Juror's Oath

In the United States, jurors are usually required to swear an oath promising to apply the law as given them by the judge. Jury nullification violates that oath. This seems to provide a reason against nullification and in favor of applying the law as given by the judge.[9]

Nearly all ethicists, however, recognize that it is sometimes permissible to break a promise. Three ethical principles governing the obligation of promises seem relevant here. To begin with, it is normally permissible to break a promise when necessary to prevent serious and undeserved harms to another person. For instance, suppose you have promised to pick a friend up from the airport, but on the way, you encounter an injured accident victim in need of medical assistance. It would be permissible, if not obligatory, to assist the accident victim, even though doing so will prevent you from picking up your friend. And this is true regardless of whether your friend will be understanding about your failure to pick him up.

Second, a promise prompted by a threat of unjust coercion is typically not ethically binding.[10] If a gunman threatens to shoot you unless you promise to pay him $1,000, that promise will have no moral force. Thus, if you escape the gunman after making the promise, you have no moral obligation at all to deliver $1000 to him. The same goes for unjust threats against third parties: if a gunman threatens to shoot *your neighbor* unless you promise to pay $1,000 to the gunman, that promise, too, is invalid. If the neighbor escapes after you have made the promise, you have no obligation at all to hand over the money.

Third, even when a promise is initially valid, it is permissible to break the promise if doing so is necessary to forestall a threat of unjust harm *from the person to whom the promise was made*. The promisee in such a case has no valid complaint, since it is his own threatened unjust behavior that makes it necessary to break the promise. For example, suppose I have voluntarily promised to lend you my rifle next week-end. Before the week-end arrives, you credibly inform me that you intend to use the rifle to murder several people. In this case, I should not still lend you the rifle. It is not merely that my prima facie obligation to keep the promise is *outweighed* by the need to prevent several murders. Rather, your threat of unjust harm completely cancels any obligation I would have had to keep my promise to you. I would not, for example, owe you compensation, or even an apology, for my

---

[9]Biskupic 1999, quoting Judge Greene; Cabranes 1997, pp. 608, 614.

[10]See Chwang 2011.

breaking of my promise to you. You have no valid complaint at all, since your own unjust threat forced me to break the promise.

All three of these principles are operative in the case of the juror's oath to apply the law. First, since the harms suffered by an unjustly convicted defendant are usually extremely serious, the need to avert those harms would normally justify the breaking of a promise, even if there were no further special conditions in the case. Second, however, the juror's oath is not a valid promise to begin with, since jurors who are aware of the injustice of the law applicable to a given case are essentially forced to take the oath in order to prevent the state from inflicting unjust harms on the defendant. Since jurors know that the court will automatically exclude them from the jury if they decline the oath, and that in most cases the resulting jury could not be trusted to acquit the defendant, a given juror's only feasible means of preventing punishment of a defendant under an unjust law is to falsely promise to apply the law.[11] Third, even if the juror's promise to apply the law were initially valid, any prima facie obligation created by that promise is cancelled if and when the state–the party to whom the promise was made–makes an unjust threat that can only be averted by breaking that promise. The juror's oath thus has no moral force at all in a case in which the application of the law would be unjust.

This conclusion may be confirmed by considering a modification of the example of the homophobic hoodlums. Imagine that the gang leader not only asks whether your friend is gay but also asks you to swear that your answer on this point will be truthful. You reasonably believe that refusal to swear will result in a beating for your friend. This case is scarcely more difficult than the original case. Clearly, you should swear to tell the truth and then immediately lie to the gang. In doing so, you do not wrong the gaybashing gang or anyone else. The gang would have no valid complaint against you for your breaking of your promise, since it is their own unjust coercive threat that forced you both to make the promise and to break it.

Thus, suppose that a citizen is called to serve on the jury in a drug possession case. Suppose, hypothetically, that she knows that the drug laws are unjust and that it is unjust to punish individuals under those

---

[11]U.S. Department of Justice statistics show a 94% conviction rate in federal prosecutions in the U.S. (ABC News 2010). Earlier data show a conviction rate of between 85 and 90% for state courts (Ramseyer et al. 2008, p. 17).

laws.[12] Since her only feasible way of preventing the state from inflicting serious, unjust harm on the defendant is to swear a false oath and subsequently vote to nullify the law, this juror would be justified in doing precisely that. The state can have no valid complaint about the violation of the juror's oath, since it was the state itself that, through its threat of unjust coercion, rendered both the making and the breaking of that oath necessary.

3.2. Against the Rule of Law

The most common charge against jury nullification is that the practice is "lawless" or violates "the rule of law."[13] Judges and commentators who advance this complaint rarely provide more than a cursory explanation, but there seem to be two natural interpretations.

The first interpretation is that jury nullification is "lawless" in the sense that it is illegal. This is simply false. No law requires a juror to vote "guilty" if the juror believes the defendant has been proven to have violated a law. It is recognized on all sides that, whether they are right or wrong in doing so, juries have the legal power to nullify.[14] The fact that a jury chose to nullify does not constitute legal grounds for appeal by the prosecution, nor can any juror be punished for choosing to nullify.

The second and more important interpretation is that jury nullification is inconsistent with the rule of law, understood as the principle that the justice system should operate entirely by definite, known rules, as opposed to subjective human judgment. Jury nullification decreases the predictability of trial outcomes, and it results in some defendants being treated unequally: of two defendants guilty of the same crime, one might be convicted and the other go free due to differing jury assessments regarding the justice of the law under which the defendants were charged.[15] Some critics warn that tolerance for jury nullification would therefore lead to "anarchy."[16]

---

[12]For discussion of the injustice of drug prohibition, see Husak 2002; Huemer 2009.

[13]George 2001, p. 311; Bissell 1997.

[14]Sobeloff 1969, p. 1006; Leventhal 1972, pp. 1133, 1135; Bazelon 1972, p. 1139; Ostrowski 2001, pp. 107-8.

[15]Story 1835, p. 1043; Leipold 1996, pp. 307-8; Crispo et al. 1997, pp. 3, 39.

[16]Sobeloff 1969, p. 1009; Leventhal 1972, pp. 1133, 1137; Crispo et al. 1997, pp. 39, 41; Bork 1999, p. 21; Biskupic 1999, quoting Colorado circuit

This argument is very difficult to make out in a plausible manner. When a juror is faced with a defendant prosecuted for blameless lawbreaking, it is very difficult to sympathize with the idea that the juror should vote to inflict unjust harm on this individual in order to ensure uniformity in the imposition of injustice across all similar defendants. There are at least three reasons for this.

One reason is that the justice system is rife with both unpredictability and subjective judgment, quite apart from jury nullification. The majority of crimes are never solved by the police, so one who violates the law cannot know whether he will ever be caught.[17] Police are allowed discretion in deciding whether to make an arrest, and prosecutors are allowed discretion in deciding to whether to charge suspects, even when there is sufficient evidence to support a charge. When suspects are prosecuted, different juries may make different judgments about the factual evidence, rendering jury trial outcomes unpredictable even without nullification. No one claims that any of these phenomena render our system "anarchic" or "lawless."[18] The marginal increase in unpredictability due to a given jury's decision to nullify is negligible and hardly likely to push society over the threshold into anarchy.

Second, even if one had the power to eliminate all such uncertainties, it is absurd to prefer that *all* members of some group suffer severe and unjust harms rather than that only *some* do, merely on the grounds that the uniform imposition of injustice is more predictable or egalitarian than nonuniform injustice. Consider an analogy. Suppose you know from recent newspaper reports that several gay people have already been beaten by homophobic hoodlums. When you encounter the gaybashing gang, should you instruct the gang to beat your friend, so as to ensure uniformity of treatment? Surely one should not cause an individual to suffer serious unjust harms merely because others in your situation have done so.

Third, the sort of social policy considerations raised by critics of nullification are foreign to the kind of concern for justice in the

---

Judge Frederic B. Rodgers.

[17]According to FBI statistics, about half of all reported violent crimes and a fifth of reported property crimes are solved by law enforcement agencies (U.S. Federal Bureau of Investigation 2010, table 25). These figures do not take account of unreported crimes.

[18]This point has been noted by Brooks (2004, p. 419) and Butler (2004, pp. 46-7).

individual case that is normally the hallmark of criminal justice. The function of a criminal trial is to do justice *by that defendant*–that is, to punish the defendant in the case at hand if and only if he has done something that deserves punishment.[19] The function of a trial is not to mete out punishment that will be convenient to some larger social policy objective irrespective of the defendant's own desert. This point is widely accepted in other contexts. Thus, suppose you are on the jury in a case in which you believe that the defendant did not in fact perform the acts of which he is accused. But suppose you also believe that, for whatever reason, most other juries, in similar circumstances, would vote to convict the defendant. No one would argue that in such a situation, you should vote to convict the apparently innocent defendant so as to ensure greater predictability or uniformity in the criminal justice system as a whole. Such considerations would rightly be regarded as irrelevant; the question is whether this particular defendant is in fact guilty.

Whether an individual *did not do* what he is accused of doing, or the individual did what he is accused of doing but that conduct *was not wrong*, it is in either case unjust to punish that individual. And it is difficult to see why we should be any more tolerant of the imposition of unjust punishments in the one case than we are in the other. It is therefore very difficult to see how the goal of increasing predictability in trial outcomes might justify imposing punishment on a particular individual who has done nothing wrong.

3.3. The Potential for Abuse

Not all instances of jury nullification are as salutary as the case of John Peter Zenger. During America's more racist past, southern juries, out of sympathy for the defendants, sometimes voted to acquit those guilty of hate crimes. It is impossible to say how many cases of jury nullification involve this sort of abuse of the jury's power and how many involve morally reasonable exercises of the jury's power. There is room for concern as to whether jury nullification is on the whole a force for good or a force for evil.[20]

But while this concern might provide a reason for designing institutions that render jury nullification less common, it is difficult to see how it could provide a reason for an individual jury or jury member

---

[19]See Bazelon 1972, p. 1142; Arnold 1945, pp. 666-7.

[20]George 2001, p. 311; Leipold 1996, pp. 304-6; Crispo et al. 1997, pp. 38-40.

not to nullify the law. Suppose you are on a jury in a trial in which the defendant is accused of violating an unjust law, and you are considering a nullification vote. Your motivation is not racist, and you know that it isn't. You know that your motivation is the injustice of the law. It is difficult to see how the fact that some racist juries have voted to acquit defendants who should have been punished negates the very strong reason that *you* have, in this case, to acquit the defendant. The fact that others have done A for bad reasons does not make it wrong for one to do A for good reasons.

Consider again the example of the gang of hoodlums. Suppose that you are just about to lie to the gang, when it occurs to you that many people have lied for bad reasons. In fact, surely there have been more cases of corrupt lying in human history than there have of morally justified lying. It would be absurd to suggest that this historical fact somehow negates the reason that you have for lying in this case, or that you are morally bound to always tell the truth merely because more lies have been harmful than have been beneficial.

A closely related objection to nullification holds that, if juries may nullify the law to the benefit of the defendant, they may also nullify the law to the detriment of the defendant–for instance, a jury may decide to convict a defendant because of personal antipathy toward the defendant, or to convict on the basis of a lower standard of evidence than the legally prescribed "reasonable doubt" standard. The only way to prevent this, it is urged, is to reject jury nullification.

Despite the confidence with which it is advanced, the logic of this argument is very difficult to make out.[21] The premise seems to be that if nullification is justified to prevent unjust punishments, then nullification would also have to be justified in all other cases. Compare the following claims:

- If one may lie to save a friend from unjust violence, then one may also lie to defraud innocent people of their savings.
- If it is permissible to break a promise in order to aid someone in need, then it is permissible to break a promise in order to cause pain and suffering to others.
- If it is permissible to kill in self-defense, then it is permissible to kill someone out of hatred for their race.

All of these conditionals are clearly false. *Pace* Kant, there are moral

[21]This is the argument that prompted Judge Steigmann (1998, p. 441) to declare jury nullification "intellectually bankrupt."

distinctions among lies–some reasons for lying are good reasons, while others are not. We accept this point for nearly any other type of action. It is thus obscure why, when we come to consider jury nullification, we should suddenly declare that no moral distinctions exist.[22]

3.4. Alternative Remedies

Some critics, while acknowledging that unjust laws exist, argue that the proper remedy is to change the law through political activism, rather than to nullify the law in the jury room.[23]

At first glance, the recommendation of attempting to change the law through political activism is a non sequitur, since political activism and jury nullification are mutually compatible. An individual may agitate to change a law with equal vigor whether or not the individual has served on a jury that voted to nullify that law in a particular case. Therefore, the idea that political activism to change unjust laws is desirable does not provide a reason against nullification.

Perhaps the suggestion is that jury nullification is rendered *unnecessary* by the option of political activism, because the repeal of the unjust law would end the injustice without resort to nullification. There are two problems with this suggestion. The first is that in most cases, an individual jury member's probability of successfully changing public policy is approximately zero. This is not to deny that broad political movements carried forth by thousands or millions of citizens often cause changes in public policy. But the individual juror does not have control of thousands or millions of others; the individual must decide on *his own* actions. And the individual's probability of making the difference to the success or failure of a broad social movement is typically negligible. The second problem is that, even if an individual juror had the option of repealing the law, that repeal would come too late for the particular defendant in the trial for which the juror is now serving. By hypothesis, the unjust law exists as of the time of trial. And the immediate motivation for nullification is not to change the law; the immediate motivation for nullification is to secure justice for the defendant presently before the court–to ensure that *that individual* is not unjustly punished. The suggestion that one convict the defendant and then later petition the legislature for political change

---

[22]Greenawalt (1987, p. 367) suggests that juries be instructed that they should nullify the law "only in an extreme case of a terrible injustice." More accurate and detailed principles could doubtless be devised.

[23]Leventhal 1972, p. 1132; Leipold 1996, p. 300, 311.

does nothing to secure justice for that individual.[24]

3.5. Unfair Burdens on Juries

Some argue that the doctrine of jury nullification places excessive burdens on juries. If juries must judge not only the facts of the case before them but also the morality of the law, then juries will face great cognitive and emotional burdens. Whenever a defendant is punished, the jury will feel responsible for the punishment, which may impose a significant psychological burden in cases in which the justice of the law is open to debate. It is much easier on the jury to allow them to simply determine the facts and place responsibility for the laws on the legislature.[25]

This argument involves more solicitude for the psychological comfort of those who punish others than for the rights or welfare of those who may be subject to punishment. Psychologists have found that the social diffusion of responsibility is one of the key factors facilitating the abuse of power. People are far more willing to inflict unjust harm on others when the moral responsibility for the harm is unclear or divided among many parties, when those deciding to inflict the harm need not directly confront the victim, and when those directly inflicting the harm can refer responsibility to some authority figure.[26] A decent respect for human dignity requires that, if an individual is to be subjected to severe, intentional harms, someone who actually sees the individual and hears that individual's story should take responsibility for the harm.

But regardless of the question of social policy, the ethical point is that a jury is in fact responsible for the punishment of a defendant whom they convict. If you inform a gang of gaybashers that your friend is gay, knowing that this will result in their violently attacking him, you cannot evade responsibility for the results. Imagine someone arguing that to say you have a right to lie to the gang would give you a feeling of responsibility that might prove psychologically burdensome to you–and therefore, that you have no right to lie to the gang. This argument is surely to be rejected. Likewise, whatever psychological burdens might result from a recognition of the duty of jury nullification, the duty is nonetheless real.

---

[24]Cf. Matravers 2004, p. 83.

[25]Crispo et al. 1997, p. 3; Leventhal 1972, p. 1136.

[26]Milgram 2009.

3.6. The Undemocratic Nature of the Jury

Defenders of jury nullification have characterized juries as representatives of the people, serving to preserve the community's values against potentially oppressive elites.[27] Critics, however, complain that juries are often unrepresentative of the community, that they are accountable to no one, and that their decisions are unreviewable.[28] Legislators, by contrast, are chosen by all of the voters and are accountable to the voters. Therefore, the laws passed by the legislature are more representative of community values than the opinion of a particular jury.

Does this argument establish the wrongfulness of jury nullification? There are four reasons why it does not. First, the naive assumption that legislation invariably represents shared values simply in virtue of the existence of democratic elections ignores the extensive literature in public choice theory. Legislation can diverge from community values for numerous and well-known reasons, including the facts that elections are influenced by charisma, campaign funding, and other factors extraneous to candidates' policy positions; that voters are aware of only a tiny portion of candidates' positions; that voters often choose a political candidate merely as the lesser of two evils; and that victorious candidates are not required in any case to remain faithful to the positions they took during the campaign.[29]

Second, even when the law reflects public opinion in general, the great mass of the public is ignorant of the specifics of any given criminal case. A rule that seems acceptable in general may have unacceptable implications in individual cases, particularly where there arise unusual circumstances not anticipated by those formulating the rule. Only those who are apprised of the circumstances of a particular case are in a position to evaluate whether the application of the law to that individual case would be unjust.[30]

Third, the requirement of unanimity among twelve individuals all familiar with the facts of a given case provides a far more rigorous check against unjust punishments than a simple principle of majority rule. In the context of criminal justice, it is widely recognized that an imposition of unjust punishment is much worse than a mere failure to impose just punishment; hence, it is said that it is better to allow many

---

[27] Adams 1971, p. 253; Butler 2004; Bazelon 1972, p. 1142.

[28] Leipold 1996, pp. 299, 307; Crispo et al. 1997, p. 3.

[29] Dye and Zeigler 1984, ch. 7; Huemer 2013, section 9.4.

[30] Cf. Bazelon 1972, p. 1140n5.

guilty individuals to go free than to punish a single innocent person.[31] Even if we naively assume that public policy invariably reflects majority opinion, a blanket commitment to apply the law in all cases allows individuals to be punished for conduct that only 51% of the population deems worthy of punishment.[32] This extremely low standard for punishment is not consistent with a genuine recognition of the moral seriousness of coercive punishment and of the grounds for caution in applying such punishment.

Fourth and most importantly, majority will does not make an unjust act just. The historical examples of grave injustices carried out with the imprimatur of the majority are too well-known to require enumeration here. One may of course worry that a jury of twelve is as likely as the rest of society to harbor prejudices that lead to its approving of unjust laws. But that is not the question here. Our question is not one of public policy or the design of institutions, interesting as those questions may be. Our question is one of individual conduct. It is the question of what an individual juror ought to do when confronted with a case of blameless lawbreaking. If one believes that the defendant has done no wrong, one must regard the judicial punishment of the defendant as an injustice. The fact that such punishment would be supported by the majority of one's society, if indeed it would be, does nothing to render the punishment just, and it provides at most very little ground for one to doubt one's own opinion. If one believes, for example, that drug prohibition is unjust, the news that a narrow majority of one's own society supports prohibition should not convince one that prohibition is just after all. The fact that juries in general may be unreliable at determining what is just, if indeed they are, is likewise irrelevant. What is relevant to the ethical duty of the individual juror is whether *this defendant* has done wrong for which he deserves to be punished.

Sometimes, of course, the juror simply does not know whether some conduct is right or wrong. But other times, one does know. And when one knows that the defendant's conduct was not wrong, one also knows that punishing the defendant would be unjust.

---

[31]Volokh 1997.

[32]This is approximately the current state of public opinion in regard to the use of marijuana, of which about half the U.S. population supports prohibition (Pollingreport.com 2012).

4. Conclusion

The logic of jury nullification is simple, obvious, and on its face compelling: it is unjust to punish a person for an ethically blameless act. Every agent is morally obligated to avoid causing unjust harms to others. Therefore, a jury is morally obligated to avoid causing a defendant to be punished for an ethically blameless action. When confronted with a case of blameless lawbreaking, a jury's only means of satisfying this moral duty is to acquit the defendant.

Opponents of nullification have not confronted this argument. As much ink as has been spilled in the cause of condemning jury nullification, no one has attempted to say which of the preceding premises is false. Might it be that it somehow *is just* to punish people for blameless acts? Or that there actually is nothing wrong with causing unjust harms to others? Or that voting to convict a defendant somehow does *not* cause any harm to the defendant? It seems to me that any of these claims would be very difficult to make out.

Most of the arguments "against jury nullification" are not ethical arguments directed at individual acts of nullification, but rather public policy arguments addressed to the desirability of a general policy of encouraging nullification. While this public policy issue certainly merits discussion, it is not the issue that confronts any individual in the jury room. The individual in the jury room must decide how to vote in the specific case before him, and that decision ought to turn, first and foremost, on what is required to treat the individual defendant presently before the court with justice.

Much of the opposition to jury nullification may be motivated by a kind of visceral reverence for law and authority. It may therefore be worth reminding those who are animated by such reverence of the reasons for which law is to be valued to begin with. We value respect for law (at least, we ought to do so) not because of some drive to follow rules merely as such, but because law is a tool in the service of *justice*. It is a tool for protecting the rights of individuals. If, therefore, law is to serve its function and remain worthy of our respect, it cannot be divorced from the demands of morality and justice. We cannot say, "Let the law be enforced, and justice be damned," as categorical opponents of nullification would have us say. If there is no such thing as justice, or if we can never discern it, then we have no grounds for respecting the law. But if there is such a thing as justice, and if we have some means of discerning it, then it may sometimes happen that an individual can see some particular law to be unjust. To hold that even in such a case, those who violate the law still ought to be

punished is to fetishize a mere tool, to the point of valuing its preservation over that of the goal for the sake of which the tool was invented.

I have focused herein on the question of individual ethics, setting aside the political question of to what extent the state ought to encourage or discourage jury nullification. In closing, I want to briefly remark on that political question. It seems to me that, once we recognize the moral duty in certain cases to disregard the law, it is very difficult to maintain that public institutions ought to officially oppose jury nullification. It is not incoherent, but it is very strange to hold that it ought to be the official policy of the state–as in fact it presently is–to aggressively discourage people from acting, in certain circumstances, in the only morally decent manner available to them. To make it a rule to instruct jurors that they cannot do something which they in fact not only *can* do but are often morally *obligated* to do seems, on its face, a duplicitous and fundamentally unethical position.[33]

References

ABC News. 2010. "Feds' Conviction Rate Bad Sign for Blago," August 4, <http://abclocal.go.com/wls/story?section=news/local&id=7593302>. Accessed October 3, 2012.

Adams, John. [1856] 1971. *The Works of John Adams, Second President of the United States*. New York: AMS Press.

Arnold, Thurman. 1945. Opinion in *Holloway v. United States,* 148 F.2d 665.

Bazelon, David L. 1972. Dissenting opinion in *United States v. Dougherty*, 473 F.2d 1113.

Biskupic, Joan. 1999. "In Jury Rooms, Form of Civil Protest Grows," *Washington Post*, February 8, p. A1. Available at <http://www.washingtonpost.com/wp-srv/national/jury080299.htm>, accessed April 5, 2012.

Bissell, John W. 1997. "Comments on Jury Nullification," *Cornell Journal of Law and Public Policy* 7: 51-6.

Bork, Robert H. 1999. "Thomas More for Our Season," *First Things: A Monthly Journal of Religion & Public Life* 94: 17-21.

Brooks, Thom. 2004. "A Defence of Jury Nullification," *Res Publica* 10: 401-23.

Butler, Paul. 2004. "In Defense of Jury Nullification," *Litigation* 31:

[33]Cf. Bazelon's (1972, p. 1140) dissent.

46-9, 69.
Cabranes, Jose A. 1997. Opinion in *United States v. Thomas*, 116 F.3d 606.
Christiano, Thomas. 2008. *The Constitution of Equality: Democratic Authority and Its Limits*. Oxford: Oxford University Press.
Chwang, Eric. 2011. "On Coerced Promises," pp. 156-82 in *Promises and Agreements: Philosophical Essays*, ed. Hanoch Sheinman. Oxford: Oxford University Press.
Crispo, Lawrence W., Jill M. Slansky, and Geanene M. Yriarte. 1997. "Jury Nullification: Law versus Anarchy," *Loyola of Los Angeles Law Review* 31: 1-61.
Dye, Thomas R. and L. Harmon Zeigler. 1984. *The Irony of Democracy: An Uncommon Introduction to American Politics*, sixth edition. Monterey, Calif.: Wadsworth.
George, Ronald M. 2001. Opinion in *People v. Williams*, 106 Cal.Rptr.2d 295.
Greenawalt, Kent. 1987. *Conflicts of Law and Morality*. New York: Oxford University Press.
Huemer, Michael. 2009. "America's Unjust Drug War," pp. 223-36 in *The Right Thing to Do*, fifth edition, ed. James and Stuart Rachels. New York: McGraw Hill.
Huemer, Michael. 2013. *The Problem of Political Authority*. New York: Palgrave Macmillan.
Husak, Doug. 2002. *Legalize This! The Case for Decriminalizing Drugs*. London: Verso, 2002.
Klosko, George. 2005. *Political Obligations*. Oxford: Oxford University Press.
Leipold, Andrew D. 1996. "Rethinking Jury Nullification," *Virginia Law Review* 82: 253-324.
Leventhal, Harold. 1972. Majority opinion in *United States v. Dougherty*, 473 F.2d 1113.
Linder, Douglas. 2001. "The Trial of John Peter Zenger: An Account," <http://law2.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html>, accessed April 5, 2012.
Matravers, Matt. 2004. "'More Than Just Illogical': Truth and Jury Nullification," pp. 71-83 in *The Trial on Trial, vol. 1: Truth and Due Process*, ed. Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros. Oxford: Hart Publishing.
McCloskey, H. J. 1957. "An Examination of Restricted Utilitarianism," *Philosophical Review* 66: 466-85.
McCloskey, H. J. 1963. "A Note on Utilitarian Punishment," *Mind* 72: 599.

Milgram, Stanley. 2009. *Obedience to Authority: An Experimental View*. New York: Harper.

Ostrowski, James. 2001. "The Rise and Fall of Jury Nullification," *Journal of Libertarian Studies* 15: 89-115.

Pollingreport.com. 2011. "Illegal Drugs," poll results reported at <http://www.pollingreport.com/drugs.htm>, accessed April 7, 2012.

Ramseyer, J. Mark, Eric Rasmusen, and Manu Raghav. 2008. "Convictions versus Conviction Rates: The Prosecutor's Choice," Harvard Law and Economics Discussion Paper No. 611, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108813>. Accessed October 3, 2012.

Rawls, John. 1999. *A Theory of Justice*, revised edition. Cambridge, Mass.: Harvard University Press.

Simmons, A. John. 1979. *Moral Principles and Political Obligation*. Princeton, N.J.: Princeton University Press.

Sobeloff, Simon E. 1969. Opinion in *United States v. Moylan*, 417 F.2d 1002.

Steigmann, Robert J. 1998. Concurring opinion in *People v. Smith*, 296 Ill. Ap. 3d 435.

Story, Joseph. 1835. Opinion in *United States v. Battiste*, 24 F.Cas. 1042.

U.S. Federal Bureau of Investigation. 2010. "Offenses Cleared" in "Crime in the United States 2009," <http://www2.fbi.gov/ucr/cius2009/offenses/clearances/index.html>, accessed April 12, 2011.

Volokh, Alexander. 1997. "*n* Guilty Men," *University of Pennsylvania Law Review* 146: 173-216.

Zenger, John Peter. 1736. *A Brief Narrative of the Case and Trial of John Peter Zenger*. Available at <http://law2.umkc.edu/faculty/projects/ftrials/zenger/zengerrecord.html>, accessed April 5, 2012.