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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. Though the practice is widely condemned by courts, 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.
Keywords: JURY NULLIFICATION, JURIES, POLITICAL OBLIGATION

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 *true*, and he offered to present evidence that this was so. 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.[2] Many other cases of suspected jury nullification have occurred since the Zenger trial. 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 of alcohol crimes. More recently, Dr. Jack Kevorkian

[1]Zenger 1736; Linder 2001.

[2]There are a variety of reasons why the particular application of the law might be considered unjust, including that there were extenuating circumstances surrounding the particular criminal act, that the punishment is likely to be excessive (see, e.g., Babcock 2013, pp. 5-8), that the defendant has already suffered enough (see Husak 1990), or that the defendant has some other special characteristics such that he does not deserve punishment. In addition, jury nullification is sometimes advocated as a reaction to misconduct by the state or its agents (see Butler 2004).

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.[3]

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 mentioning the possibility of nullification. Jury members whose intention to nullify is revealed before the conclusion of the trial may be removed from the jury.[4]

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 most salient and important kind of jury nullification 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.

It is sometimes thought that such cases are very rare, that almost all law-violations are morally blameworthy. If so, the present discussion might be of little import to the actual conduct of juries, however correct my central contentions might be. The chief reason for believing this would be the doctrine of *political obligation*, the idea that individuals have a general moral obligation to obey the law because it is the law.[5] On this view, even if some conduct is not wrong considered in itself, once the conduct is prohibited by law, it normally becomes morally wrong to engage in said conduct, simply because it is against the law.

When I speak of an action that is illegal but morally blameless, I mean that the action is morally blameless *all things considered*–that is, even after taking account of the fact that the action was illegal, it was still morally blameless. On an *unqualified* doctrine of political obligation, such actions are impossible.

But virtually no one holds an unqualified doctrine of political obligation, i.e., that *all* laws generate *indefeasible* obligations of obedience. Defenders of political obligation generally

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

[4]Cabranes 1997; George 2001.

[5]Klosko 2005; Christiano 2008; Rawls 1999, section 19; Estlund 2008; Markel 2012.

qualify the notion in a variety of ways. They may hold that citizens have political obligations only in certain kinds of regimes; that even in such regimes, certain kinds of laws fail to generate political obligations; and that even when one has political obligations, these obligations are only prima facie obligations and thus are capable of being outweighed by other moral considerations.[6] According to Christiano, laws that explicitly treat citizens as unequal fail to generate obligations of obedience, and according to Markel, laws that are either illiberal or "spectacularly dumb" fail to generate such obligations.[7]

Thus, my first response to the challenge from the doctrine of political obligation is this: even if one believes in political obligation, one almost certainly will want to accept some qualifications to that doctrine, such that it is not extremely difficult to find cases in which a person is, all things considered, morally justified in violating a law. Stipulate that we are considering such a case.

The second response I would like to suggest is that even a highly qualified doctrine of political obligation is false. Suppose, that is, that we are in a liberal democracy, and that a given law was made democratically, is constitutional, is not illiberal or spectacularly stupid, and does not treat citizens as unequal. Even then, I think the fact that the law requires some behavior does not by itself provide any moral reason for engaging in that behavior. Given this, I believe that cases of blameless lawbreaking are easily found. For instance, I consider virtually all drug crimes to be cases of blameless lawbreaking, thus making jury nullification appropriate in a very large portion of all actual criminal trials in the United States.

This skeptical view of political obligation cannot be established in this essay; a book-length treatment would be required.[8] For now, I will rest with these observations: skepticism about political obligation is by now a very well-regarded, if not orthodox position in political philosophy. If this skepticism is justified, then there are a great many cases of blameless lawbreaking. Furthermore, even those who believe in political obligation typically admit qualifications to the doctrine that render cases of blameless lawbreaking reasonably easy to find. Therefore, the question of what a jury should do with a defendant guilty of blameless lawbreaking is an interesting and practically significant one.

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?

No person with a reasonable and mature moral sense will have difficulty with this case. Clearly, you should answer no. 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 to your friend. The case illustrates the following ethical principle: it is prima facie wrong to cause another person to suffer serious unjust harms. This is true even when

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[6]On the notion of prima facie duties, see Ross 1988, ch. 2. Prima facie obligations are capable of being cancelled or outweighed by other moral considerations.

[7]Christiano 2008, ch. 7; Markel 2012, p. 16.

[8]See Simmons 1979; Huemer 2013.

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.

I am not going to give an *argument* that one should lie to the gaybashing gang. Rather, I take it as a *premise* that one should lie to the gang, and that it would be wrong to either answer "yes" or refuse to answer. I take this to be intuitively obvious; if the reader does not agree with this, then I have nothing further to say on the matter. The best explanation for why lying is required in this example is that one should lie to the gang because one would otherwise cause one's friend to suffer a serious unjust harm at the hands of the gang, and this one should not do without a good reason. In this case, the desire to avoid telling a falsehood would not be a sufficiently good reason.

The duty to avoid contributing to serious, unjust harms might 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.[9] This suggests that the right not to be unjustly punished is overridden, if at all, only by very serious considerations.[10]

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 imperative to avoid making inaccurate statements.[11]

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.

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[9]McCloskey 1957; 1963.

[10]On the right not to be punished, see Husak 2008, pp. 92-103.

[11]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.

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.

But suppose a jury member, defending a conviction for an act of blameless lawbreaking, argues that in voting for conviction, the juror is not thereby responsible for the unjust harm that the defendant subsequently suffers. We might imagine the juror saying to the defendant: "Look, I recognize that your punishment is unjust. But your complaint is against the state and its agents (other than me). *They* made the law under which you are being punished, and *they* are punishing you. All I did was truthfully report on the factual question of whether you performed a certain act. I am not responsible for the fact that the state wrongly takes that information as grounds for punishing you." Relatedly, one might hold that the juror does not truly "cause" the unjust harm, in the morally relevant sense, since the causal chain goes through other agents who more directly cause the harm, and the juror has not solicited these other agents to cause that harm.

This defense must fail, as would the analogous defense in the gaybashing gang case. Suppose you tell the gang that your friend is gay. After they beat him up, could you then plead innocence on the grounds that you did not *yourself* beat your friend, nor did you actually tell the gang to beat him? Presumably not. Again, I take it as obvious that lying to the gang is the morally correct behavior in this case. If, therefore, a philosopher advances a theory of responsibility or causation (or any other sort of theory) on which it is permissible or obligatory to tell the gang the truth in this case, that theory is thereby refuted; the present case would constitute a counterexample to the theory.

Now, the sense in which the jury *causes* the defendant to be punished seems to be the same as the sense in which the character in the gaybashing gang example would *cause* his friend to be beaten. For example, in both cases, the causal chain goes through another agent; in neither case does one instruct the other agent to impose the harm; but in both cases one knows that the other agent will in fact impose that harm. Since it is wrong to cause the harm in the case of the gaybashing gang, it is also wrong to cause–in the same sense–the harm in the case of the jury.

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."[12] This initially suggests that judges must know some extremely powerful

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

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.

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 to them by the judge. Jury nullification violates that oath. This seems to provide a reason against nullification.[13]

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. First, it is normally permissible to break a promise when doing so is the only feasible means 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.[14] 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*, and the only way to prevent the shooting is to 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 breaking of my promise to you, 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, the juror's oath is not a valid promise to begin with, since potential jurors who are aware of the injustice of the law applicable to a given case must take the oath if they wish

[13]Biskupic 1999, quoting Judge Greene; Cabranes 1997, pp. 608, 614.
[14]See Chwang 2011.

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,[15] 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.

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 would be 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, and suppose the citizen knows that it is unjust to punish individuals for drug possession.[16] 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 citizen 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."[17] 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.[18] 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

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[15]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).

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

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

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

with the rule of law, understood as the principle that the justice system should operate 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 relevant law.[19] Some critics warn that tolerance for jury nullification would therefore lead to "anarchy."[20]

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 why this idea would be implausible.

The first 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.[21] 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.

The point here is that unpredictability is rarely regarded as a great problem, certainly not as rendering the system "lawless" or "anarchic". Hardly anyone thinks, for example, that prosecutorial discretion should be eliminated in order to make the system more predictable. Since an exercise of jury nullification does not create more unpredictability than an exercise of prosecutorial discretion, it is hard to see why jury nullification should be regarded as creating a great problem, or rendering the system lawless or anarchic.[22]

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 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

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

[20]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 Judge Frederic B. Rodgers.

[21]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.

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

punishment.[23] 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. Role Obligations

Role obligations are obligations that attach to a specific role in a social institution; the social conventions define the role and its duties. In some cases, as in that of certain familial obligations, one acquires role obligations simply by being born into the role. In other cases, one acquires role obligations by voluntarily accepting the role.[24] One might think that, in serving on a jury, one signs on to a particular, socially defined role within the justice system, and that this role requires one to deliver a verdict based solely upon the factual evidence and the law as explained by the judge.[25] In other words, perhaps jury nullification is a violation of one's role obligations qua juror.

There are two things wrong with this argument. First, the argument presupposes an account of the juror's role that is disputable and, in the present context, question-begging. On one account, which we may call the "fact-finder" account, the proper role of a juror is to find a verdict based solely on the factual evidence and the law. On another account, which we may call the "justice-pursuer" account, the proper role of a juror is to find a verdict based upon whatever justice-relevant considerations apply to the case; it is, in brief, to judge whether the defendant in the case ought justly to be punished. Advocates of jury nullification will prefer the latter, rather than the former account.

How should we decide what is the correct account of the juror's role? One might argue that the fact-finder account corresponds more closely to the conventions of our society. Those conventions, however, are at least in dispute; many members of our society have endorsed, and continue to endorse, the justice-pursuer account. Furthermore, the role of justice-pursuer is independently morally superior to the role of fact-finder–that is, if we

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[23]See Bazelon 1972, p. 1142; Arnold 1945, pp. 666-7; Husak 2008, ch. 2.

[24]Hardimon 1994.

[25]In response to the thought that one does not voluntarily sign on for this role since jury service is compulsory, one may point out that such service is not in fact compulsory, since one may generally escape jury service by declining to take the juror's oath, or simply stating that one's conscience would not allow one to convict a defendant under an unjust law.

consider the question without assuming that we have either set of role obligations to begin with, we should find the behavior of a person filling the justice-pursuer role to be morally (far) superior to that of a person filling the fact-finder role.[26] This provides at least some reason for holding that the juror's role is properly understood as that of a justice-pursuer rather than a mere fact-finder.

Granted, this reason is far from conclusive. There certainly can be social roles that require behavior that, considered independently, would be unethical (some of this behavior may even be unethical *all things considered*). But this brings us to the second response to the role obligation argument: even if the social role of a juror is that of a mere fact-finder, the moral reasons for jury nullification will typically outweigh or cancel the juror's role obligation.

Imagine a society with xenophobic norms. In this society, there is a social role called "Aggressor," where the town Aggressor is supposed to hunt down foreigners and beat them up. Suppose that you have voluntarily signed on for the role of Aggressor; thus, you have a putative role obligation to beat foreigners. But obviously, you are not in fact morally obligated, or even permitted, to beat foreigners. Either the social role in question fails to generate a role obligation in the first place (perhaps because role obligations to perform otherwise immoral actions are invalid), or the role obligation is easily outweighed by the general moral obligation not to cause unjust harm.[27] (This conclusion would remain true even if the role of Aggressor included other, perfectly acceptable duties in addition to that of beating up foreigners, such that the role was overall beneficial.) The point is that the appeal to social roles exerts little if any justificatory force in favor of behavior that, considered apart from one's social role, would normally be seriously immoral. Similarly, the act of convicting a defendant for a morally blameless action would be seriously immoral, considered apart from one's alleged role obligation as a juror; so the appeal to one's social role exerts little if any justificatory force in favor of such conviction.

3.4. 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.[28]

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 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.

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[26]It appears that widespread acceptance of the justice-pursuer account would also be better for society as a whole, insofar as it would result in fewer unjust convictions than the fact-finder account. This reasoning is speculative and might be mistaken if, for example, lawmakers were generally better at discerning the requirements of justice than jury members and if extenuating circumstances were rare. Without going into detail, I will merely state that I do not believe those things to be the case.

[27]Cf. Hardimon 1994, p. 361, discussing morally impermissible social roles.

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

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.[29] 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 obviously false. *Pace* Kant, there are moral distinctions among lies–some reasons for lying are good reasons, while others are not. Similarly for killings, breakings of promises, and 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 can be made.[30]

3.5. 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.[31]

At first glance, the recommendation of attempting to change the law through political

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

[30]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.

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

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. 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 does nothing to secure justice for that individual.[32]

3.6. 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.[33]

This argument involves more solicitude for the psychological comfort of those who punish others than for the rights or welfare of those who are 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.[34] 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. For this reason, it is socially preferable for the juror's role to be construed along the lines of "justice-pursuer" as suggested in section 3.3, rather than along

[32]Cf. Matravers 2004, p. 83.
[33]Crispo et al. 1997, p. 3; Leventhal 1972, p. 1136.
[34]Milgram 2009.

the lines of "fact-finder."

But regardless of the question of social policy, the ethical point is that a jury is in fact partly responsible for the punishment of a defendant whom they convict. As we saw in section 2.3, if you inform a gang of gaybashers that your friend is gay, knowing that this will result in their violently attacking him, you would bear a certain moral responsibility for the result. The gang themselves would bear the primary blame, but you could not claim to be entirely blameless. 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.

3.7. 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.[35] Critics, however, complain that juries are often unrepresentative of the community, that they are accountable to no one, and that their decisions are unreviewable.[36] 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.[37]

Second, even when the law reflects public opinion in general, the 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 know 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.[38]

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 legal context, 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 preferable to allow many guilty individuals to go free rather than to punish a

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[35]Adams 1971, p. 253; Butler 2004; Bazelon 1972, p. 1142.
[36]Leipold 1996, pp. 299, 307; Crispo et al. 1997, p. 3.
[37]Dye and Zeigler 1984, ch. 7; Huemer 2013, section 9.4.
[38]Cf. Bazelon 1972, p. 1140n5.

single innocent person.[39] 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.[40] 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.

4. Controversial Implications

So far, I have argued that a jury member must vote for acquittal when the juror knows or justifiedly believes that the conduct of which the defendant is accused is morally blameless. This is the central thesis I have been concerned to defend. In this section, however, I shall touch on three related questions: first, what general stance ought the state to take towards jury nullification? Second, how should government officials other than jurors react to cases of blameless law-breaking? Third, what should jury members do in a case in which it is uncertain whether a particular law violation was ethically blameworthy or not? I cannot discuss these questions in detail, but I shall briefly suggest where I think the argument points.

4.1. Public Policy

Most arguments "against jury nullification" are not ethical arguments directed at individual acts of nullification, but rather public policy arguments concerning the desirability of a

[39]Volokh 1997. For a dissenting view, see Allen and Laudan (2008), who assume a consequentialist perspective (e.g., pp. 73, 79-80), including in particular the assumption (p. 83) that the failure to prevent a harm is equally wrong, on the part of the state, as the active imposition of a harm. *Pace* Allen and Laudan, I assume a conventional, deontological ethical perspective.

[40]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 2011).

general policy of encouraging nullification. It is important not to confuse questions of individual ethics with questions of public policy. Nevertheless, the public policy question is an interesting one on its own.

What stance, then, ought the state to take toward jury nullification? Should judges instruct jurors against nullification? Should jurors be asked to take oaths that exclude nullification? Conceivably, one might endorse these practices while still holding, as I have argued, that nullification is often justified on the part of an individual juror. Nevertheless, that position strikes me as implausible. Typically, one should not actively promote false moral views, nor should one aggressively discourage wide classes of action that are very often morally obligatory.

One of course *could* be justified in doing these things in some circumstances. For instance, if jurors had some powerful anti-law bias, such that they would wrongly judge a law to be unjust much more often than they would correctly judge a law to be unjust, then it might be better to promote the view that jurors should apply all laws, whether just or unjust, than to promote the view that jurors should apply only just laws. But this factual supposition falls very far from reality. On the contrary, most people harbor powerful pro-authority and pro-status quo biases, such that they are much more likely to wrongly approve of an existing law than to wrongly disapprove.[41] I therefore consider the current policy of aggressively discouraging jury nullification to be both harmful and unethical.[42]

4.2. Implications for Other Officials

If jury members should refuse to participate in the enforcement of unjust laws, what about such government officials as police officers, prosecutors, and judges? Should these officials likewise attempt to prevent the enforcement of the law?

In my view, the answer is yes. Just as it is wrong for a jury to cause unjust punishment by convicting a defendant for blameless lawbreaking, it is wrong for a police officer to cause unjust punishment by arresting such a defendant, or for a prosecutor to cause unjust punishment by prosecuting such a defendant. A judge confronted with a defendant convicted for an act of blameless lawbreaking should issue the minimum sentence available.

However, for these government officials, matters are complicated by the likely behavior of other officials. For example, in the present political regime, a police officer who regularly refuses to arrest morally innocent defendants may well lose his job, as will a prosecutor who regularly refuses to charge morally innocent defendants. This might in the long run result in greater injustice when the police officer or prosecutor is replaced with someone with fewer scruples. Thus, government officials may face the dilemma of deciding whether to perform some injustices in order to prevent greater injustices from being committed by other agents. Jurors do not face this dilemma, since their decision to nullify in a particular case will generally not reduce the probability of appropriate nullification by future juries.

I have nothing new to say on the subject of when an official may commit injustice in order to remain in a position to prevent other injustices in the future. I will simply remark that if one finds oneself regularly required, by the demands of one's position, to commit serious injustices, then one probably ought to seek alternate employment in a more just profession.

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[41]On the public's pro-authority biases, see Milgram 2009; Huemer 2013, ch. 6.
[42]Cf. Bazelon 1972, p. 1140.

4.3. Moral Uncertainty

Sometimes, we simply do not know whether some conduct is morally permissible or not. Some thinkers argue that moral uncertainty provides a reason for deference to the law, thus limiting the scope of jury nullification.[43] It is said that to nullify the law, based upon one's own judgment that the law in question is unjust, requires one to repose undue confidence in the reliability of one's own moral judgment. Once one recognizes one's own fallibility, one ought rather to defer to the judgment of the community, as reflected in the laws that have emerged from the democratic system.[44]

In response, note first that, although there are many cases of moral uncertainty, there are also many cases of moral knowledge. For example, I may not know whether it is wrong to have an abortion, but I *do* know that the Jim Crow laws were wrong. Or, to take more recent and interesting cases, I know that it is not wrong to smoke marijuana, and that it is not wrong for a doctor to assist a terminally ill patient in dying with dignity. It is not through arrogance that I hold these judgments in contravention to the beliefs of many other members of my society; I hold these judgments as a moral philosopher who has seriously studied and reflected upon these issues, knowing that the vast majority of those who have similarly studied and reflected hold the same views. Thus, even if we concede that moral uncertainty supports deference to the law, there remains significant scope for jury nullification.

More importantly, however, moral uncertainty does not make a case for deference to the law; moral uncertainty makes a case for nullification. The reason was touched upon earlier: it is far more wrong to impose an unjust punishment than it is to merely fail to impose what would have been a just punishment. This is widely accepted in the philosophy of the criminal law, and it explains why we impose a strong burden of proof on the prosecution in a criminal trial. The burden of proof means that, if there is reasonable doubt as to whether a defendant is guilty of a crime, we should err on the side of caution by not punishing that defendant. For exactly the same reason, if there is reasonable doubt as to whether what the defendant did was wrong, we should err on the side of caution by not punishing that defendant. Whether a defendant is punished for something he did not do, or a defendant is punished for something that he did that was morally blameless, in either case the punishment is equally unjust. Therefore, if we impose a prosecutorial burden of proof for establishing that the defendant committed the act of which he is accused, we should impose a similar burden of proof for establishing that the act committed by the defendant was morally blameworthy.

Thus, contrary to the view of some critics, a nullification vote does not express an attitude of epistemic arrogance. Nullification is in fact the proper manifestation of epistemic *humility*. Those who vote to convict a criminal defendant need to be confident that the defendant acted wrongly and that punishment is just. In many cases, such confidence is justified–as, for example, when the defendant has been proven to have committed a murder. But when the morality of a given type of action is controversial in one's society, the mere fact that a law prohibiting that action emerged from the democratic process provides scant

[43]Christiano 2008, p. 98; Markel 2012, pp. 78-9.

[44]At one university where I presented this paper, an interlocutor insisted that my defense of jury nullification presupposed that my moral judgment was infallible. I was unable to obtain further information as to how my argument presupposed this.

basis for confidence that the action is wrong. To consider an action wrong merely because the legislature, or even the majority of one's society, considers it wrong is not to express epistemic humility; it is to express extreme credulity.

5. 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 does *not* cause harm to the defendant? It seems to me that any of these claims would be very difficult to make out.

Opponents of jury nullification may be motivated by a kind of visceral reverence for law and authority. It may thus be worth reminding such opponents of why we value the law in the first place. We value the 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 we may sometimes be able to see that enforcing the law in a particular case would 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.

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