Go Forth and Nullify

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I. THE WORTH OF JURY NULLIFICATION

Democracy in America, successful as it is, has its perils. Three, in particular, inhere in its republican structure. These are: 1) laws that are contrary to the general will, 2) unenlightened laws, and 3) tyrannical laws.

While our constitutional order includes some safeguards, such as judicial review, to protect us from noxious laws, one of the most important shields of liberty: jury nullification, or the power that jurors have to exercise their consciences and nullify laws that they deem to be unjust, has been barred from the modern American courtroom.[1] This was not always the case.

American courts used to recognize nullification as a legitimate power.[2] It had, after all, played an important role in frustrating British attempts to restrict freedom in the colonies.[3] Even after the Crown's return to Britain, jury nullification remained as the people's means of invalidating

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1 *See United States v. Dougherty*, 473 F.2d 1113, 1140 (D.C. Cir. 1972) (Bazelon, J. dissenting) ("Nullification is not a 'defense' recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case. Yet the impact of the [trial] judge's instruction, was almost surely to discourage the jury from measuring the defendants' action against community concepts of blameworthiness.").

2 *See Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) ("It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, *and to determine the law* as well as the fact in controversy.") (*emphasis added*).

3 *See*, *for example*, Doug Linder, *The Zenger Trial: An Account* (2001) *at* http://law2.umkc.edu/faculty/projects/ftrials/zenger/zenger.html ("The Zenger trial is a remarkable story of a divided Colony, the beginnings of a free press, and the stubborn independence of American jurors.").

abhorrent laws.[4]

Given this history, the hostility with which jury nullification is greeted today is surprising. Nonetheless, the Executive opposes it,[5] and judges strain to keep it a secret.[6] This is a mistake. By purging the doctrine of jury nullification from our trials, courts deny the people a critical method of controlling their government.[7]

II. THE PERILS OF DEMOCRACY

A. Laws That Are Contrary to the General Will

Unlike the will of individuals, or the "private will," the "general will" is the will of society as a whole.[8] Its truest expression occurs when every member of society directly participates in the creation of legislation by gathering in some common place, listening to arguments for and against

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[4] *See Dougherty*, 473 F.2d at 1130 ("Most often commended [as examples of jury nullification] are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law.").

[5] *See* Benjamin Weiser, *Jury Nullification Advocate is Indicted*, N.Y. Times, February 25, 2011, *available at* http://www.nytimes.com/2011/02/26/nyregion/26jury.html?_r=1&emc=eta1("Since 2009, Mr. Heicklen has stood there and at courthouse entrances elsewhere and handed out pamphlets encouraging jurors to ignore the law if they disagree with it, and to render verdicts based on conscience. That concept, called jury nullification, is highly controversial, and courts are hostile to it. But federal prosecutors have now taken the unusual step of having Mr. Heicklenindicted on a charge that his distributing of such pamphlets at the courthouse entrance violates a law against jury tampering.").

[6] *See Dougherty*, 473 F.2d at 1136 ("In the last analysis, our rejection of the request for jury nullification doctrine is a recognition that there are times when logic is not the only or even best guide to sound conduct of government.").

[7] *See* Alexis de Tocqueville, Democracy in America 318 (Gerald E. Bevan trans., Penguin Classics 2003) (1835) ("The jury system may be aristocratic or democratic according to the class which supplies the juries; but it always retains a republican character in that it entrusts the actual control of society into the hands of the ruled, or some of them, rather than into those of the rulers.").

[8] *See* Jean-Jacques Rousseau, The Social Contract 153 (Maurice Cranston trans., Penguin Classics 1968) (1762) ("The constant will of all the members of the state is the general will; it is through it that they are citizens and free. When a law is proposed in the people's assembly, what is asked of them is not precisely whether they approve of the proposition or reject it, but whether it is in conformity with the general will which is theirs; each by giving his vote gives his opinion on this question, and the counting of votes yields a declaration of the general will.").

proposals, and casting votes. This is the vision of pure democracy aspired to by the ancients, whose largest unit of government, the city-state, was small enough to allow for it.[9]

America, however, has always been too vast for this kind of direct democracy to be possible. As a result, our nation is not a true democracy, but a republic in which the people elect representatives to enact their laws.[10]

The practical result of our republic is that we, the people, are separated from the specific acts of our legislators. This means that the republican nature of our democracy requires us to surrender a measure of sovereignty over our laws for, though the country's general will may have an idea as to the direction in which it would like to move, aside from the selection of legislators, it has no power to get there.[11]

To the extent that legislators act in harmony with the general will, this is acceptable. However, since the divide that separates the people from their legislators prevents them from being aware of every enactment, it is unavoidable that some laws will run counter to their values and desires. It is also possible that, even when they are able to discern it, some legislators will ignore the general will in order to cater to a private interest.[12] When this happens, the laws that are passed imperfectly reflect the general will.

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[9] *See* Aristotle, Politics 292 (Ernest Barker trans., Oxford University Press 1958) (ca. 350 B.C.E.) ("Both in order to give decisions in matters of disputed rights, and to distribute the offices of government according to the merit of candidates, the citizens of a state must know one another's characters. Where this is not the case, the distribution of offices and the giving of decisions will suffer. Both are matters in which it is wrong to act on the spur of the moment; but that is obviously what happens when the population is overlarge.").

[10] *See* The Federalist No. 10, at 76 (Madison) (Clinton Rossiter ed., Signet Classic 2003) ("The two great points of difference between a democracy and a republic are: first, the delegation of the government in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.").

[11] Rousseau, *supra* at 141 ("Any law which the people has not ratified in person is void; it is not law at all. The English people believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as the Members are elected, the people is enslaved; it is nothing.").

[12] *See id* at 112. ("Nothing is more dangerous in public affairs than the influence of private interests, and the abuse of the law by the government is a lesser evil than that corruption of the legislator which inevitably results from the pursuit of private interests.").

Jury nullification addresses this harm by bringing the electorate into direct contact with legislation and allowing them to judge it for themselves. Therefore, the act of informing jurors of their power to nullify, even if they choose not to exercise it, is an act of pure democracy since the law cannot be implemented without the people affirming their commitment to it by upholding it. A verdict returned by an informed jury thus enjoys a level of validity that is denied to a verdict returned by an uninformed jury, since only the former can be confidently be said to be an expression of the general will.[13]

B. Unenlightened Laws

The previous section shows how jury nullification operates to realize the general will. What, however, is to be done when the general will is wrong?

The general will errs when it is ignorant.[14] A just democracy depends upon an educated electorate.[15] Despite this, very little care is taken in modern America to ensure that the public really is informed before it is asked to apply a particular law. Instead, an assumption seems to be made that the public is somehow innately capable of making wise decisions. This assumption is folly.[16]

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[13] *See Dougherty*, 473 F.2d at 1144-45 (Bazelon, J., dissenting) ("The reluctance of juries to hold defendants responsible for unmistakable violations of the prohibition laws told us much about the morality of those laws and about the 'criminality' of the conduct they proscribed. And the same can be said of the acquittals returned under the fugitive slave law as well as contemporary gaming and liquor laws. A doctrine that can provide us with such critical insights should not be driven underground.").

[14] *See* Rousseau, *supra* at 83 ("How can a blind multitude, which often does not know what it wants, because it seldom knows what is good for it, undertake by itself an enterprise as vast and difficult as a system of legislation? By themselves the people always will what is good, but by themselves they do not always discern it. The general will is always rightful, but the judgment which guides it is not always enlightened.").

[15] *See* Thomas Paine, The Rights of Man 212 (Everyman's Library 1994) (1792) ("A nation under a well-regulated government, should permit none to remain uninstructed. It is monarchical and aristocratical government only that requires ignorance for its support.").

[16] *See* Rousseau, *supra* at 83 ("Individuals see the good and reject it; the public desires the good but does not see it. Both equally need guidance. Individuals must be obliged to subordinate their will to their reason; the public must be taught to recognize what it desires. Such public enlightenment would produce a union of understanding and will in the body, bring the parts into perfect harmony and lift the whole to its fullest strength. Hence the necessity of the lawgiver.").

The public desires to do the right thing, but, without a full understanding of the issue it is asked to consider, its judgment is often bad.[17]

Jury nullification inoculates against ignorance by turning the courtroom into a legal schoolroom.[18] Good trial lawyers are educators. Indeed, the law reports brim with cases in which lawyers explain and argue over topics ranging from D.N.A. evidence, to financial markets, to mineral rights, to railway easements, to surgical instruments, to many other specialized fields, many of which are byzantine and obscure. Why should lawyers be barred from discussing the law which, of all subjects, is the one upon which they are most qualified to speak?

In fact, trials present an ideal opportunity to assess the law. At a trial, knowledgeable, articulate, and, most importantly, adverse parties advocate for their positions. When these parties are allowed to make nullification arguments, a searching inquiry into the wisdom, purpose, and efficiency of the law is generated. Thus, jury nullification arguments guarantee not only that the law reflects the general will, but also that it reflects the desire of an *enlightened* general will. Just as importantly, it assures that unenlightened laws will not be enforced.[19]

Critics argue that the public's knowledge of the law should be assumed. In their view, it would be improper to suggest that the people are ignorant of their laws. This assumption is contrary to reason. It is unrealistic to believe that the public has a comprehensive knowledge of the universe of the law, when that universe is so expansive that trained practitioners spend careers specializing in one legal area without mastering, or even encountering, all of their field's nuances.

In addition, this assumption is counter to the evidence. Consider the example of federal

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[17] *See id* at 72. ("We always want what is advantageous to us, but we do not always discern it. The people is never corrupted, but it is often misled; and only then does it seem to will what is bad.").

[18] *See* Tocqueville, *supra* at 321 ("I do not know whether juries are much use to litigants but I am sure that they are of great use to those who judge the case. They are, in my view, one of the most effective means available to society for educating the people.").

[19] *See* Tocqueville*, supra* at 293 ("When, therefore, I refuse to obey an unjust law, I am not denying the majority's right to give orders; I simply appeal to the sovereignty of the human race over that of the people.").

Judge Jack Weinstein, who refused to accept guilty verdicts on charges of receipt of child pornography, after learning that two of the Defendant's jurors would have acquitted the Defendant had they known about the mandatory minimum sentence of five years.[20] Clearly, at least some of those jurors were ignorant of the law.

Critics may further argue that, by presenting an example of a circumstance in which a criminal law would have been nullified upon consideration of a sentencing law, the above illustration epitomizes the dangers of jury nullification. But, the people are the source of both the criminal and the sentencing laws. It defies the precepts of self-government to say that the "correct" result can only occur when the people are ignorant of at least some of their laws.

In addition, this particular case presents an example of a law that may have been passed with the consent of the people, but without their enlightenment. At least one researcher has suggested that allowing certain persons to access pornography may actually minimize violent sexual crime.[21] This may not be true, and it is quite possible that a jury would reject this hypothesis, but, if it did so, at least we could be more certain of the law's merits, since it would have survived their scrutiny after a thorough hearing.

Finally, if the people really are familiar with their laws, then there is no harm in informing them of their nullification power. Since the law exists with their knowledge, presumably they are in

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[20] *See* A.G. Sulzberger, *Defiant Judge Takes On Child Pornography Law*, N.Y. Times, May 21, 2010, *available at* http://www.nytimes.com/2010/05/22/nyregion/22judge.html?pagewanted=2&emc=eta1 ("Judge Weinstein declared that Mr. Polizzi had a constitutional right to have a jury know the punishment that would accompany a guilty verdict, a right he said he had violated. He pledged to inform the next jury of the mandatory minimum sentence.").

[21] *See* Anthony D'Amato, *Porn Up, Rape Down* (2006) *at* http://anthonydamato.law.northwestern.edu/Adobefiles/porn.pdf ("The incidence of rape in the United States has declined 85% in the past 25 years while access to pornography has become freely available to teenagers and adults. The Nixon and Reagan Commissions tried to show that exposure to pornographic materials produced social violence. The reverse may be true: that pornography has reduced social violence.").

agreement with it and will simply reaffirm it at trial. Indeed, sound laws will grow in esteem as they withstand repeated challenges.[22]

In summary, a healthy democracy depends upon the enlightened consent of the governed. By allowing the people to hear arguments for and against laws, and then allowing them to debate those laws, jury nullification ensures that the law only acts with the approval of an educated public.

C. Tyrannical Laws

The tyranny of the majority is one of the most often cited pitfalls of democracy.[23] The idea is simple: democracy, operating as it does under the principle of majority rule, carries the risk that the majority will band together and oppress the few.[24] Our constitutional structure provides little protection against this risk.[25] Nullification, however, can serve as an important check on the excesses of the majority.

First, it provides a potential opportunity for members of the minority to be selected as jurors and to deny the application of the law. Second, it gives the majority an opportunity to correct itself. The majority is, after all, comprised of individuals, each of which is separately endowed with a

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[22] *See* John Stuart Mill, On Liberty 26 (Penguin Classics 2006) (1859) ("There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.").

[23] *See id* at 10 ("[T]he majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power … 'the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard.") (emphasis in original).

[24] *See* The Federalist No. 51 (Madison) *supra* at 320-21 ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part … In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the stronger.").

[25] *See* Tocqueville, *supra at* 295 ("When a man or a party suffers from an injustice in the United States, to whom can he turn? To public opinion? That is what forms the majority. To the legislative body? That represents the majority and obeys it blindly. To the public police force? That is appointed by the majority and serves as its passive instrument. To the jury? That is the majority invested with the right to pronounce judgments; the very few judges in certain states are elected by the majority. So, however unfair or unreasonable the measure which damages you, you must submit.").

conscience. It is one thing for a member of a powerful and vociferous group to agree to a law in the abstract. It is something else to serve as the instrument of oppression. If circumstances ever become so bleak that representatives of minority groups are kept from juries, and apathy has so overrun the majority that individual jurors deny their own consciences, then jury nullification will not have brought about America's ruin.[26] Rather, it will have been too weak of a medicine to prevent it.

III. COMMON CRITIQUES: ANARCHY AND INEQUALITY

One of the primary critiques of jury nullification is that it leads to anarchy.[27]Critics fear that knowledge that the law might be nullified would lead to a world that is effectively without law.

This fear overlooks the fact that nullification acts within very narrow margins. A jury's act of nullification does not repeal the law, it merely serves to strike down the application of the law in a particular case.[28] The law, however, remains. Thus, people are still incentivized to obey it by the deterrent effect of the inconvenience, embarrassment, and expense of violating it.

In addition, while nullification may be a possibility, it is not a guarantee. The jury may very well think that the challenged law is deserving of affirmation. Thus, criminal laws, for example, are still likely to be obeyed, as it is unlikely that those who contemplate violating the law would feel emboldened to do so on the chance that, following the extreme inconveniences of arrest and

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[26] *See id* at 304 ("If ever freedom is lost in America, blame will have to be laid at the door of the omnipotence of the majority, which will have driven minorities to despair and will have forced them to appeal to physical force. Then one will see anarchy which will have come as a consequence to despotism.").

[27] *See*, *for example*, *Dougherty* 473 F.2d at1133-34 ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

[28] *See id* at 1142 (Bazelon, J. dissenting) ("The doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between accident and negligence. It is the jury – as spokesman for the community's sense of values – that must explore that subtle and elusive boundary.").

detainment, a jury *might* choose to exercise its nullification power.

Another common, and related, critique of nullification is that it leads to the arbitrary or unequal application of the law. What happens, for example, when two persons are charged with the same offense, but one is convicted while the other's jury elects to nullify? In addition, what happens when the jury chooses to nullify a foundational and settled law, such as the Fifth Amendment?

With regard to the first scenario, I would argue that if juries return different verdicts on the same law, then the issue raised by that law is probably still a matter of public debate. The challenged law, therefore, is unlikely to be an accurate reflection of the general will. Such a law is properly nullified. The unfortunate thing is not that nullification created an unequal outcome, but that it was only able to produce one acquittal where two should have occurred. Nonetheless, in this hypothetical, nullification served as instrument of good - better that the people receive justice unequally than that they all be equally denied it.

As to the second objection, it must be recognized that people come to the courthouse with extra-judicial prejudices.[29] Our criminal justice system assumes that jurors will set those prejudices aside when they decide a case.[30] Those who are determined to act upon their prejudices, however, will do so, whether or not they are advised of their power to nullify.[31] Nullification arguments do not speak to such people. Instead, nullification's appeal is to those who seek to apply the law in good faith. It empowers such jurors by providing them with the knowledge that they need to act as

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[29] *See id* at 1143 ("If a jury refuses to apply strictly the controlling principles of law, it may - in conflict with values shared by the larger community - convict a defendant because of prejudice against him, or acquit a defendant because of sympathy for him and prejudice against his victim.").

[30] *See id* at 1142 ("I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.").

[31] *See id* at 1141 ("The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards.").

an enlightened community conscience.[32]

IV. CONCLUSION: JURORS AS SOVEREIGNS

Jury service goes to the heart of our democracy. It is one of the core methods by which the people oversee their government. It is also an ideal means by which to educate the public about their government.[33] And yet, when jurors come to the courthouse, we no longer allow them to consider the law, even though they are its origin.[34] Instead, we chain them inside the cave and forbid them inquiry into the nature of the shadows. In doing so, we step away from democracy and move in a direction that transforms sovereigns into puppets.

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[32] *See id* at 1142 ("The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.").

[33] *See* Tocqueville, *supra* at 322 ("[T]he jury, the most energetic method of asserting the people's rule, is also the most effective method of teaching them how to rule.").

[34] *See* The Federalist No. 49 (Madison), *supra* at 310-11 ("As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.").