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Robert P. Lawry*

INTRODUCTION

Law makes a moral claim on citizens. When that claim may be overridden by a more stringent moral claim has long been debated in the literature of jurisprudence and political theory.¹ Several years ago, I joined that debate, attempting to understand classic responses in philosophy and literature to the question of the citizen’s political obligation. Briefly, my investigation brought me to conclude: (1) citizens have a moral obligation to obey just laws, except in circumstances where civil disobedience could be invoked. Then, even just laws – like those against trespassing, for example – could be thwarted in order to protest a serious moral wrong in the body politic, so long as the protestors were non-violent and accepted punishment for their illegal, but morally justified, acts; (2) citizens did not have to be faithful to unjust laws, unless by their unfaithfulness they led others into immoral behaviors or caused a harmful civic disturbance. In short, certain obligations to others ought to take precedent over the exercise of one’s rights; and (3) if the law requires a citizen, personally, to perform an unjust act, the citizen has a moral responsibility to refuse to do so.²

This article continues the investigation of the way law exerts its moral claim on citizens. This time, however, the focus is on the citizen in the unique role of juror. I hope to continue this

*Professor of Law and Director, Center for Professional Ethics, Case Western Reserve University School of Law.
inquiry in subsequent articles by examining the political obligation of fidelity to law for citizens occupying two other roles, judge and lawyer.

Today there is a widespread and long-standing acceptance of the proposition that juries determine facts only. The judge determines the law, although the jury does bear the responsibility of applying the law to the facts. This current division of labor has ancient roots. In his influential Institutes Sir Edward Coke wrote: “To a question of fact, the judges do not answer; to a question of law, the jurors do not answer.” In the 17th and 18th Centuries, English juries may well have had law-determining functions. Juries certainly did have such authority in early colonial history, as “the final bulwark against tyranny imposed by overzealous courts, parliaments, or rulers.” Of course this was also the reaction of an oppressed people, longing to break colonial chains. After the revolution, however, when those same people obtained the power and the right to govern themselves, the movement back to the function of facts-for-juries, law-for-judges, was inexorable. Self-government was surely one reason. As judges and lawyers became more educated and professional, and the people more diverse, the very idea of the rule of law demanded a return to the original English division of role responsibilities. In Massachusetts, the matter was firmly settled by Chief Justice Lemuel Shaw of the Supreme Judicial Court as early as 1855 in the case of Commonwealth v. Anthes. Although the death knell sounded in

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3 In the United States, only Georgia, Indiana, and Maryland, via their state constitutions, give criminal jurors the right to determine the law as well as the facts. “In all three states, however, judicial decisions have essentially nullified the constitutional provisions.” Albert W. Alschuler and Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 UN. OF CHICAGO L.REV. 867(1944). See also JEFFREY ABRAMSON, WE THE JURY 62 (Harvard Univ. Press, 2000) [hereinafter ABRAMSON]. In his book, Professor Abramson cites several typical statements on this issue found in Juror’s Handbooks or in jury charges. For example, “The Massachusetts TRIAL JUROR’S HANDBOOK states that the jury ‘decides the facts….’ [but] does not decide the rules of law to be applied to the facts of the case…. The judge tells the jury the proper rules of law required to resolve the case.” Id. at 63.


5 NORMAN J. FINKEL, Commonsense Justice, 30 (Harvard Univ. Press, 1995) [hereinafter, Finkel].

6 Commonwealth v. Anthes, 71 Mass. 185 (1855).
federal law with the Supreme Court’s 1895 decision in *Sparf and Hansen v. United States*, as early as 1835, Joseph Story “went to great lengths in rejecting the entire notion that juries may decide questions of law.” On the other hand, it had been the English common law in criminal cases at least since *Bushnel*’s case in 1670 that the decision of the jury itself was unassailable. No sanction could be imposed on a juror for rendering its verdict, no matter the reason or motive. In *Bushnel*’s case Chief Justice Sir John Vaughn overturned a lower court decision fining the jurors for rendering a decision of acquittal in favor of religious dissenters, William Penn and William Mead. The lower court had found the verdict contrary to the evidence and to judicial instructions on the law. Thereafter it was solid law that acquittals are always “proper and final.” This was confirmed in America by the famous trial of publisher John Peter Zenger, acquitted of seditious libel in 1735. In civil cases, because judges exercise much greater control over juries in a variety of ways, the history is different and largely non-controversial.

Thus, at the present juncture in the history of the jury as a legal institution, the political and moral debate seems to be largely over nullification in criminal cases. That will be the subject of the rest of this essay. By nullification I mean the power of the jury to disregard the judge’s instructions on the law or to refuse to apply those instructions to the facts at hand, or even to deliberately find as facts that which the jurors themselves do not believe to have occurred, simply in order to acquit a criminal defendant. Jurors have the power to nullify the

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7 *Sparf and Hansen v. United States*, 156 U.S. 51 (1895).
10 *Id*.
11 Although civil jury nullification does remain a distinct possibility, it is both difficult to discern and less likely to occur, given the tools judges have to ensure that civil juries adhere to their instructions. *See* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001).
12 All of those possibilities, of course, are justified by some notion of justice or common sense or common sense justice. *See* FINKEL, *supra*, note 5, at 4.
law but not the legal right to do so.¹³ The current debate tends to focus on whether the judge should instruct the jury about its power to nullify or allow lawyers to argue for nullification.¹⁴ In short, should the jury be told it has such power or told simply what is the law and what is the function of the jury? Of course, jurors do engage in nullification.¹⁵ How much and for what reasons are largely debatable issues.¹⁶ The question I want to examine, however, is not a statistical or even a political question, but a moral one: what is the moral responsibility of the juror when he or she is tempted to engage in nullification? Does the special role of “juror” endow a citizen with more or less of a burden to follow the law?

Arguably, the oath the citizen takes, as juror, to apply the law as the judge directs, pushes in the direction of a greater burden.¹⁷ However, religious considerations aside, this oath is morally analogous to the burden placed upon a citizen when he or she “consents” to the social contract.¹⁸ Whatever its place in consent theory, it is difficult to argue from the giving of a “promise” alone that it can never be broken.¹⁹ Thus, we may be faced with the same question under a different form: what are the conditions allowing the juror either to break his or her

¹³But see ABRAMSON, supra note 3, at 62-63.
¹⁴Compare Richard St. John, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking 106 YALE L.J. 2563 (1997), arguing against an explicit right and judicial instruction, with R. Alex Morgan, Jury Nullification Should be Made a Routine Part of the Criminal Justice System, but It Won’t Be,” 29 ARIZ ST. L.J. 1128 (1997), arguing that judges should instruct juries on their power to nullify, thus, transforming the power into a right. The standard judicial view is quite clear and quite negative. See U.S. v. Dougherty, 473 Fed. 2d, 1113, 1130-1137 (1972) [hereinafter Dougherty]. After recounting the history of the law on the issue and the issues contained in the debate, Judge Bazalon endorses the view of Judge Sobeloff in U.S. v. Moylan, 417 F.2 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910, 90 S. Ct. 908, 25 L.Ed. 2d 91 (Feb. 24, 1979) (No. 855), that to allow a judicial charge of nullification “risks the ultimate logic of anarchy.” Dougherty at 1133. On the other hand, he agrees that jury nullification is sometimes warranted in the “exceptional case.” Dougherty at 1135.
¹⁵In a poll taken a few years ago, 75 % of the 1,012 people questioned said that as jurors, they would do what they believed was right, regardless of what a judge says the law requires. Titie, NATIONAL LAW JOURNAL, Nov. 2, 1998, p.1.
¹⁶In their famous study of THE AMERICAN JURY, Kalven and Zeisel found that less than a quarter of the disagreements between judges and juries over verdicts were due to jurors finding certain laws “too severe” to enforce. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 286-87 (1966).
¹⁸See Green, supra note 1, at 525-528.
¹⁹As far back as the 13th century Aquinas accepted as commonplace the idea that you could break a promise where the result of keeping it would be far worse. His example was to deny a sword to its lawful owner when the owner would use the sword to harm an innocent. THOMAS AQUINAS, TREATISE ON LAW (Regency Publ’g, Inc., 1956).
promise to apply the law as the judge sets it out, or, simply, as a citizen to violate the law, promise or no promise? A promise to do something does add moral weight to an independent obligation, but I will put that question aside in order to focus on my primary concern: under what moral circumstances may a citizen-juror set aside his or her obligation to apply the law as instructed by the judge? The practice of nullification itself, of course, can be argued for or against as a political matter, just as any “right” can. We value the legal right to “free speech”, though not all speech, protected under the Constitution, can be morally justified in terms of its content. Just so, with the refusal of Southern juries to convict white defendants of crimes against blacks, it has been argued that “the moral case for (nullification) … foundered and sank over the issue of race.”

Maybe. It is a political matter whether we think, or balance, that juries ought to be told they have the power to nullify. It is a moral matter, however, under what circumstances they may exercise that power, no matter how they come to know they possess it.

The route I shall take to examine this moral question is a bit circuitous. I begin by analyzing a well-known short story, A Jury of Her Peers, by Susan Glaspell. The story provokes us to think of the citizen as juror, but does not deal straightforwardly with a literal jury at all. In fact, it deals with citizens, denied the right to sit on juries, who nullify the law, thus becoming the symbolic jury for one of their peers. This examination will allow me to transition my position on a citizen’s obligation to the law to that of the juror’s. I will follow the analysis of

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20 ABRAMSON, supra note 3, at 61.
21 A Jury of Her Peers [hereinafter Peers] was first published in the magazine, EVERYWEEK, March 5, 1917, at 42. It was preceded, however, by a play, TRIFLES, first produced in 1916, in which Susan Glaspell told the identical story, albeit in a different genre. The story has been frequently anthologized, since its inclusion in THE BEST SHORT STORIES OF 1917 256 (Edward J. O’Brien ed. 1918). See Marina Angel, Susan Glaspell’s Trifles and A Jury of Her Peers: Women Abuse in Literary and Legal Context, 45 BUFFALO L. REV. 779 (1997), at 779-80, n.1-2 [hereinafter Angel]. All reverences to the story in this article will be to its reproduction in LAW AND LITERATURE: LEGAL THEMES IN SHORT STORIES (Elizabeth Villian Semmette, Whitston Publishing Co., New York (2000)).
that story with a description and analysis of an actual case, *State v. Hossack.*²² I choose this case because it was the real-life genesis of Susan Glaspell’s fictional story. She covered *Hossack* as a young reporter many years before transforming it into fiction. Interesting comparisons and contrasts can be made because of the connection between the case and the story. Finally, I will talk straightforwardly about the moral issues involved in nullification.

I. A JURY OF HER PEERS

*A Jury of Her Peers* is a feminist paean wrapped inside a mystery story. It is set for the most part inside the kitchen of Minnie Foster Wright, who, as we soon see, has been arrested and sits in jail for the murder of her husband. The deceased was found the day before with a rope around his neck in his own bedroom. Mrs. Wright claims someone entered the house as they slept and committed the crime. She did not wake up during its commission; but told no one after she discovered his lifeless body; and was sitting in the kitchen when a neighbor, Mr. Hale, dropped by to see if Mr. Wright would agree to share the cost of putting in a telephone line in the branch road, a “lonesome stretch”²³ shared by the Wright and Hale farms. At the beginning of the story, the county attorney, the sheriff, and the sheriff’s wife, stop at the Hale farmhouse to have Mr. Hale accompany them as the men search for clues as to what happened and why. In the interim, Mrs. Wright has been arrested and placed in custody. The sheriff’s wife, Mrs. Peters, asks that Mrs. Hale be with her as she locates some things to bring to Mrs. Wright in her jail cell. The story is told through a third-person omniscient narrator; but it is filtered largely through the consciousness of Martha Hale.

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²² *State v. Hossack,* 116 Iowa 194, 89 Northwestern Rept. 1077 (1902), [hereinafter, *Hossack*]. All reference to this case will be to the Northwestern Reporter printing.

²³ *Peers,* supra note 22, at 124.
From the beginning, we find Mrs. Hale sympathizing with Mrs. Wright, and annoyed by or hostile to the men in the story.\textsuperscript{24} Although not close friends, and initially wary of each other, Mrs. Hale and Mrs. Peters quickly bond in this sympathy and hostility.\textsuperscript{25} Although ridiculed by the men for their concern with “trifles,”\textsuperscript{26} it is the women who find the most important clues concerning Mr. Wright’s death. The women conspire to conceal the evidence, no doubt in the hope that Mrs. Wright is not ultimately convicted.\textsuperscript{27} The men are ostensibly looking for evidence of motive, “Something to show anger – or sudden feeling.”\textsuperscript{28} The women find just such evidence. First, Mrs. Hale finds a dish towel, half-clean, half-messy.\textsuperscript{29} Then a sugar bucket, and a “half-empty bag beside it.”\textsuperscript{30} It reminds her of her own kitchen, when she was suddenly asked to ride out with the others to the Wright’s farm. She makes a direct connection to “(t)hings begun – and not finished.”\textsuperscript{31} There is more. Mrs. Peters discovers that Mrs. Wright was “piecing a quilt,”\textsuperscript{32} but that the last bit of sewing was a botch. “Why, it looks as if she didn’t know what she was about,” says Mrs. Peters, although the other patches were sewn “so nice and even.”\textsuperscript{33} At this point, there is a shock of recognition between the two women; and Mrs. Hale immediately begins to undo the bad sewing, despite Mrs. Peter’s nervous admonition that they

\textsuperscript{24} \textit{Id.}
\textsuperscript{25} For example, “Suffering in silence as the men joked that women concerned themselves with ‘trifles’,” (\textit{Id.} at 126) or “they wouldn’t know a clue if they did come upon it” (\textit{Id.} at 128). Mrs. Hale, “as if releasing herself from something strange” in the wake of the departure of the men from Mrs. Wright’s kitchen, “said testily” that she would “hate to have men coming into my kitchen … snoopin’ round and criticizin’.” (\textit{Id.}) Perhaps the key paragraph occurs immediately after Mrs. Hale secretly critized Mrs. Peters for not caring about Mrs. Wright: “Then she looked again, and she wasn’t so sure; in fact, she hadn’t at any time been perfectly sure about Mrs. Peters. She had that shrinking manner, and yet her eyes looked at if they could see a long way into things.” (\textit{Id.} at 129).
\textsuperscript{26} \textit{Id.} at 126.
\textsuperscript{27} \textit{Id.} at 134.
\textsuperscript{28} \textit{Id.} at 130.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 131.
ought not “to touch things.” Later, the men will joke that Mrs. Peters was “married to the law;” and her initial misgivings were those of a women who saw things from the point or view of her husband, a law-man. That trait eventually gives way to feelings of solidarity with Mrs. Wright and Mrs. Hale, indeed with all women. Mrs. Peters says to Mrs. Hale toward the end of the story: “We all go through the same things – it’s all just a different kind of the same thing! If it weren’t – why do you and I understand? Why do we know – what we know this minute?”

By this time they had found an empty bird cage with its hinge roughly broken open; and they had found the conclusive piece of evidence: Mrs. Wright’s canary bird, dead in a little red box.

“Someone’s wrung its neck,” Mrs. Peters said, “in a voice that was slow and deep.” She remembered how, as a child, a boy had killed her kitten with a hatchet, and how, “If they hadn’t held me back I would have …hurt him.” Each of the women, in a silent conspiracy, lied about and concealed what they had found. In the end, Mrs. Peters tries to hide the box with the dead bird in it in her handbag – but the bag is too small. Just in time, Mrs. Hale grabs the box and shoves it into the “pocket of her big coat.” They hide “the thing that would make certain the conviction of the other woman – that woman who was not there and yet who had been there with them all through that hour.”

Not only had Mrs. Hale and Mrs. Peters been able to piece together the evidence of what had triggered the strangling of Mr. Wright and the fact that Mrs. Wright had done it, they also provided themselves with a context in which such a thing could occur. They knew some things pretty clearly. Mrs. Hale knew the Minnie Foster (Wright) of twenty years ago to have been a

34 Id.
35 Id. at 136.
36 Id. at 135.
37 Id. at 134.
38 Id.
39 Id.
40 Id. at 137.
41 Id.
“lively” girl, who wore “pretty clothes” and who “sang in the choir.” Mrs. Hale recalled that Minnie “was kind of like a bird herself. Real sweet and pretty, but kind of timid and – fluttery.” Together the two women outlined a portrait of Mr. Wright, and something of the life the Wrights lived together. Publicly John Wright was what people called a “good man” – he “didn’t drink … kept his word as well as most … paid his debts.” At the same time he was a “hard man … Like a raw wind that gets to the bone.” He was miserly. The evidence here was abundant. The stove was broken; Mrs. Wright wore “shabby” clothes; even the kitchen rocker where Mrs. Wright must have often sat “didn’t look in the least like Minnie Foster – the Minnie Foster of twenty years before. It was a dingy red, with wooden rungs up the back, and the middle rung was gone, and the chair sagged to one side.” Clearly, he would not provide his wife with elementary things; necessary things; like a working stove; and basic things - like decent clothes. How much of this was due to poverty, the story does not say. The story does say he was “close,” and not mindful of Mrs. Wright’s desires. Moreover, he was taciturn, a man who did not like to talk or hear others talk. Life on the farm was very lonesome for Mrs. Wright. It was “not a cheerful place” – which was why Mrs. Hale did not come to visit the Wright’s farmhouse. Mrs. Hale’s first indication that Mrs. Peters saw and understood much of what she saw and understood, was captured in Mrs. Peter’s lament: “A person gets discouraged – and loses heart.”

More than the above would be the reader’s interpretive speculation, rather than the reflections of two women whose behavior is the focus of its telling. Did Wright physically abuse

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Id. at 129.
Id. at 133.
Id.
Id.
Id. at 129.
Id. at 124.
Id. at 127.
Id. at 130.
his wife? There is no direct evidence he did, nothing either woman even allude to. But they knew he was capable of violent acts. They had good evidence he tore off the door of the birdcage and “wrung the neck” of the bird with his bare hands. Did he psychologically abuse her? There is the evidence of his unwillingness to have a telephone installed in his house. By this refusal, he surely contributed to his wife’s social isolation. It was also clear, even to the other men, that “what his wife wanted did not make much of a difference to” Wright. His coldness and indifference, no doubt, were causes of psychic pain. How much? How deep was the pain? Evidence that would help in answering those questions is scarce. I bring up these two abuse categories to set the stage for an analysis of the moral arguments that might be made to justify the extraordinary actions of two, obviously otherwise good and decent women. They hid evidence relevant to a criminal proceeding and lied about it. They broke the law. Today, battered woman syndrome, used as a justification or excuse defense or in mitigation of murder, would allow the production of evidence of physical and psychological abuse. Morally, it seems to me that evidence of a similar nature is – and always has been – similarly relevant. If we begin with the proposition that citizens are sometimes justified in breaking the law if the law is “unjust,” then these issues must be probed in context. Moreover, the context itself must be probed to examine the exact nature of the injustices that might provide a justification or excuse not just for Mrs. Wright’s committing a homicide, but a justification for the law-breaking of Mrs. Hale and Mrs. Peters. Obviously, however, the two are connected.

50 Id. at 124.
51 Surely the women understood that hiding or destroying evidence were law-breaking activities. That is the ironic significance of the references to Mrs. Peters being “married to the law.” Id. at 136.
53 See Lawry, supra, note 2.
(A.) WAS THE LAW UNJUST?

Justified Civil Disobedience aside, and generally speaking, a citizen has an obligation to obey the law. Under certain circumstances, perhaps, a citizen may break an unjust law.54 Here the law broken by Mrs. Hale and Mrs. Peters was not, on its face, even arguably unjust. Hindering the prosecution or conviction of an alleged criminal is hardly an unjust law. We surely want the government to be able to prosecute alleged criminals; and any civilized society will have laws against any interference with that task. Of course, from a moral point of view, if the crime for which the evidence is relevant is itself unjust, one could perhaps legitimately piggy-back a violation of the innocuous law concerning evidence destruction onto the unjust law in order to make out a moral argument. For example, if laws which allowed people to be bought, sold and held in bondage are unjust, then laws – otherwise just – which directly support those laws, could surely be disobeyed. Thus, manufacturing false identification documents for runaway slaves during this country’s ante-bellum period seems justified to me, even though the law against manufacturing false official documents is, on its face, a good one.

A word of caution is needed at this point. Aquinas made the argument that citizens have no straightforward obligation to obey unjust laws, except in two circumstances: (1) when it would produce a civic disturbance; and (2) when it would cause “scandal,” i.e., lead innocents into doing moral wrong.55 Centuries before, Socrates had argued that a citizen had an obligation to obey even an unjust law, when the result otherwise would be to do a moral wrong. Aquinas was just putting some exactitude into the Socratic admonition.56 Therefore, this piggy-backing argument would have to meet the stringency test articulated by Aquinas in cautioning citizens when they disobey any unjust law.

54 Id.
55 AQUINAS, supra note 19, Q. 96, art. 4, at 97.
56 See Lawry, supra, note 2, at 678-81.
How might this piggy-back analogy work in *A Jury of Her Peers*? First off, the problem is not with the basic law against murder or manslaughter. Although the common law’s “malice” was an imprecise word, it generally meant “intentional” or “reckless,” words which we presently use in determining what the appropriate “guilty mind” ought to be for us to punish severely for killings committed with that kind of [mens rea].\(^{57}\) Thus, the problem may be with the definition or application of one or other defenses to murder or manslaughter. Successful defenses are generally either “justified,” i.e., considered, on balance, a social good; or “excused,” i.e., considered not socially desirable, but, focusing on the particular individual and not the act, not socially blameworthy either.\(^{58}\) Moral “defenses” may be similarly categorized. Indeed, the criminal law and the moral law ought to be consistent in categorizing defenses, even if the actual rules may not be so.\(^{59}\)

In terms of justification arguments, the most plausible would be self-defense. The argument usually goes nowhere, however, without some physical threat to Mrs. Wright. Even under current Model Penal Code standards, there is no right to kill in self-defense unless the lethal response was “necessary to protect … against death, serious bodily harm, kidnapping or sexual intercourse by force or threat.”\(^{60}\) *A Jury of Her Peers* may indicate symbolically through the bird’s broken neck that John Wright was physically abusing his wife; but would the two women themselves be justified in assuming that was the case?\(^{61}\) Increased understanding of battered women has led to some movement in the law, even excusing some women in the murders of sleeping husbands, for example, if the threat of physical harm was a constant one,

\(^{57}\) See *Model Penal Code* § 210 and accompanying commentary (1962).


\(^{60}\) *Model Penal Code*, §3.04 (2)(b) (1962).

\(^{61}\) There is certainty no textual evidence that the woman thought Wright was physically abusing his wife.
and would presumably resume when he awakens. Nevertheless, that question of timing does not change the underlying necessity for the killer to be under a serious threat of physical attack or physical confinement in order that the killing may be justified. Morally, I would suggest that this should have always been the case; but the question that baffled male judges in early battered women syndrome cases looms large here: why did she not simply leave? Surely we still would not want to condone “self-defense” when the person who is fearful for her physical well-being can retreat to safety. Theorists of battered women syndrome argue that women who are battered often exhibit a “learned helplessness” that makes them believe they cannot escape, or that, if they try to, the batterer will find them and drag them back. This is analogous to a situation where a person is imprisoned, and cannot escape except by killing their jailor who is temporarily distracted or even asleep. A kidnapped victim surely has the moral right – and even the legal right under the Model Penal Code – to kill her jailor if the opportunity arises, and only the jailer’s death will enable her to escape. Is this the situation with Mrs. Wright? Maybe. Again, the story does not say so, but we might add some perhaps pertinent background about life on a Midwestern rural farm at the turn-of-the-century. Firstly, there is the almost absolute economic dependency of the farm-wife on her farmer-husband. Secondly, there is the difficulty of divorce, again economically, but also socially, for women who lived this kind of

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62 See Dressler, supra, note 51, and cases cited at 260 n. 11.
63 The answer given is usually “learned helplessness.” As an early study put it: “A battered woman often believes that the batterer is omnipotent, that no one can help her, and thus she limits the number of responses she feels are possible or safe to make.” L.E. Walker, R.K. Thyfault, and A. Browne, Beyond the Juror’s Ken: Battered Woman, 7 VT. L. REV. 1, at 8-9.
64 Although “American jurisdictions are sharply split on the issue of retreat,” those that favor a no-retreat rule usually do so on the grounds that “the manly reaction to an unlawful attack is to stand one’s ground.” Dressler, supra, note 58, at 227. Not only is this a sexist doctrine, it is clearly one that diminishes respect for human life. Id.
65 Dressler, supra, note 52, and cases cited at 260 n. 11.
66 MODEL PENAL CODE, §3.04. (2)(b), says explicitly that killing in self-defense is justified if “necessary to protect … against … kidnapping”and some few other things (“death, serious bodily harm … or sexual intercourse by force or threat.” See Gregory A. Diamond, Note, To Have But Not To Hold: Can “Resistance Against Kidnapping” Justify Lethal Self-Defense Against Incapacitated Batters, 102 COLUM. L.REV. (2002) [hereinafter Diamond].
hard, isolated life. The problem is, what we know generally may or may not apply with poignant particularity to Mrs. Wright’s case. We know from the story she wore “pretty clothes” and was “lively” and that she sang in the “choir” when she was young. Was there no one in the community who would or could help or support her? The story tells us so little about this crucial fact. We do know that Mrs. Hale thought she, as a neighbor and a woman, should have offered Minnie Wright some support, some friendship, through the years. My reading of the story is that Mrs. Hale’s feeling of guilt was why she instinctively defended Minnie Wright before she knew anything about what happened. Moreover, it was the key reason she hid the evidence that “would make certain the conviction” of Mrs. Wright. In near despair, Martha Hale cries out: “Oh, I wish I’d come over here once in a while …. That was a crime! That was a crime! Who’s going to punish that?” Mrs. Hale’s guilt feelings tell us little, however, about the conditions of psychic imprisonment that Mrs. Wright may have experienced. If she was physically imprisoned by him, then I think she would have been justified in killing her husband-jailer, just as much as a person who was wrongly physically imprisoned under lock and key, would have the moral right to kill the one who deprived her of her liberty. Thus, under the circumstance of wrongful physical imprisonment, surely killing to escape would be justified. If the imprisonment is physic only, then, perhaps killing to escape would still be morally excusable, even if the criminal law has not reached that conclusion.

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68 Id.
69 Peers, supra note 22, at 129.
70 Her feelings of guilt were evidenced early in the story when Mrs. Hale felt she could not cross the threshold of Minnie Wright’s house “because she hadn’t crossed it before.” Id. at 123.
71 Id. at 137.
72 Id. at 135.
73 A person is guilty of kidnapping under the Model Penal Code if he or she “unlawfully confines another for a substantial period in a place of isolation … to inflict bodily injury on or to terrorize the victims.” MODEL PENAL CODE § 212.1 (1962).
74 See Diamond, supra note 66.
Being physically imprisoned is a well-accepted excuse for killing under the criminal law. Nevertheless, I see no essential moral difference between a physical imprisonment and a physic one. Any human being who has his or her liberty so curtailed is surely entitled to escape. If the only way to do so is by killing the jailor, then it seems to me the act must at least be excused. The closest hint we have in *A Jury of Her Peers* that Mrs. Wright was truly physically imprisoned is when Mrs. Peters says: “A person gets discouraged – and loses heart.” This is said after the two women discover that Mrs. Wright’s stove was broken, thus making it very difficult to perform one of her essential jobs – cook food. This statement comes directly after Mrs. Peters says with some resignation that the men must search Minnie Wright’s house for clues concerning the crime for “the law is the law.” And Mrs. Hale retorts: “and a bad stove is a bad stove.” What does this add up to? I am not sure, but I think it quite a stretch to suggest it adds up to the two women believing Mrs. Wright was physically trapped, although just maybe Susan Glaspell wanted us to entertain that possibility. On the other hand, there may have been an underlying presumption, built into the story, that farm wives in rural communities in the early twentieth century were psychically trapped in their lives. This presumption is both confirmed and challenged by the real events that became the catalyst for *A Jury of Her Peers*. A fuller discussion of this question will therefore be postponed until that real situation is explored.

A second “excuse” defense that may have been available to Mrs. Wright might be “temporary insanity.” The current MPC definition of insanity excuses responsibility for a crime to one who, “as a result of mental disease or defect … lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the

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75 *Peers, supra* note 22, at 130.
76 See infra notes pp. 119-136 and accompanying text.
requirements of law.” In a famous case, People v. Hughes, Francine Hughes was judged to be not guilty by reason of insanity, when she burned down the house in which her drunken ex-husband slept, killing him. He had physically and psychologically abused her for years; and, though he had threatened to kill her that very day unless she quit school or if she ever left him, his threat to kill was not “imminent.” The need for the threat of death or physical abuse to be imminent had been a traditional one in self-defense law (and is clearly tied to the sound social policy encouraging potential victims to retreat or escape rather than kill). Although urged by some feminists to argue self-defense, the lawyer for Mrs. Hughes chose to argue “temporary insanity” instead because of concern over the issue of imminence. Such a defense necessarily means the introduction of medical testimony, obviously not available to Mrs. Hale and Mrs. Peters. Nevertheless the judgment whether a person is “insane,” and thus excused from criminal responsibility, is a lay person’s judgment. It is a judgment made by a juror, translating scientific or medical evidence into a moral judgment regarding blameworthiness or ignoring such evidence as unconvincing. In the story itself, after Martha Hale observed that Mrs. Wright was going to bury the dead bird in a “pretty box” because she had affection for it, Mrs. Peters recalls an incident from her childhood, and the vivid emotion of that day re-visits her:

“When I was a girl,” said Mrs. Peters, under her breath, “my kitten there was a boy that took a hatchet and before my eyes – before I could get there –“, she covered her face for an instant. “If they hadn’t held me back I would have … hurt him.”

77 MODEL PENAL CODE, §4.01 (1962).
78 For the full story of this case, made into a TV movie starring Farah Fawcett, see FRANK MCNULTY, THE BURNING BED: THE TRUE STORY OF AN ABUSED WIFE (1981) [hereinafter McNulty].
79 The traditional need for imminence was the central issue in the horrific abuse case of State v. Norman, 324 N.C. 253 (1989), which has given rise to a voluminous literature, mostly condemning the tradition. See, e.g., Richard A. Rosen, On Self-Defense, Imminence, and Women Who Kill Their Batters, 71 N. C. L.REV. 371 (1993).
80 McNulty, supra note 78, at 203.
81 See, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 25.01 (4th ed. 2006).
82 Peers, supra note 22, at 134.
Mrs. Peters can remember “snapping” as a young girl. She could readily imagine Mrs. Wright snapping too – pushed over the edge, into what? “insanity?” Historically we know many farm wives at that time did suffer serious mental breakdowns. Thus, given this history, and the burdens of her terribly lonely life, was the killing not only understandable, but excusable? At least should we not see that Mrs. Peters was “provoked” so as to lose (or lessen) her own use of reason or self-control? In traditional criminal law terms, that would at least mitigate the offense from murder to manslaughter.\(^{83}\)

Those are the kinds of arguments a jury might hear in such a murder case as *State v. Wright*; but, of course, these arguments – and the facts assembled to support them – were, at best, only fragmentarily available to Mrs. Hale and Mrs. Peters, reacting quickly as their instincts directed them during that small space of time when they were alone in Mrs. Wright’s kitchen, and discovering more and more, as the men of the law wondered into and out of their space. Under the facts “found” by the two women, should a real jury convict? Exonerate? Nullify? The questions seem absurd. The women themselves hastily assembled the prosecution’s case and reacted defensively to it. Who knows what facts might have been developed for use at a real trial? Or what theories developed in defense? Here, of course, is the root of the moral problem: Mrs. Hale and Mrs. Peters determined that certain relevant facts would not be available to convict Mrs. Wright at her trial. It was a rush to judgment; but, in the end, their actions were defensible or not defensible as a moral matter, depending on two things: (1) the underdeveloped state of the law regarding defenses to murder; and (2) the fact that no jury assembled to judge Mrs. Wright could have had a woman on it.\(^{84}\) Although

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\(^{83}\) *Model Penal Code* § 210.3(1)(b) (1962). The MPC abandons the use of provocation terminology, to rid itself of out-dated common law categories, but the basic idea remains constant.

both are potentially arguments about justice, the second perhaps enfolds the first. In any event, the second was the heart of the matter for Susan Glaspell. She called the story *A Jury of Her Peers*; and the story itself is a demonstration of the ignorance and insensitivity of men, their lack of understanding of who Mrs. Wright was and what she suffered at the hands of her cold-hearted husband. Hiding the evidence of a “motive,” understood by men in a traditional way, at least evened the odds that perhaps the actual jury impaneled in this case would show some paternalistic sympathy toward the defendant, perhaps engage in jury nullification, and exonerate her. The need for evidence of a motive was felt strongly by the county attorney. Without such evidence, a conviction was not at all certain. “(I)t’s all perfectly clear,” he said, “except the reason for doing it. But you know juries when it comes to women.” Apparently all-male juries at that time were quite willing to exonerate women who killed their men, so long as the women seemed “female” enough, that is, meek and submissive. Mrs. Wright probably fit the stereotypical image. Something like “insanity” may have actually won the day for her, at least it might have given the jury something upon which to hang their not guilty verdict. Perhaps Mrs. Hale and Mrs. Peters instinctively thought this could be the case. Even more likely, without a “motive,” an all male jury in those days might easily have allowed themselves to believe that this meek and submissive woman was

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85 As contrasted with the title she gave to her initial attempt to tell this story, *Trifles*, a play that “emphasized the household items from which the two women deduce the full story of the crime,” the title, *A Jury Of Her Peers*, “calls attention to women’s legal place in American society at a time when they were unable to vote and considered, under the law, to be inferior to men.” Patricia L. Bryan, *Stories in Fiction and Fact: Susan Glaspell’s Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack*, 49 STAN. L.REV. 1293, 1306, n. 44 [hereinafter Bryan].

86 The story is filled with these demonstrations. For example, Mr. Hale insensitively mocks the women early on, with the question, “But would the women know a clue if they did come upon it?” *Peers*, supra note 22 at 128.

87 Male juries at that time “were particularly lenient with female defendants, especially those who were extremely feminine in manner and who behaved as women were expected to behave.” Bryan, *supra* note 85, at 1333-34 & n. 221, citing ANN JONES, *WOMEN WHO KILL* 98, 104 (1991).

88 *Peers, supra* note 22, at 136.

89 *Id., supra*, note 86.

90 Hale described the young Minnie Wright as a girl who “used to wear pretty clothes and be lively — when she was Minnie Foster, one of the town girls, singing in the choir.” *Id.* at 129.
not capable of killing her husband and, thus, did not. Remember, Mr. Wright was strangled with a rope, not an easy task for a person less physically strong than the victim. The moral question remains: was it appropriate for Mrs. Hale and Mrs. Peters to take these matters into their own hands under the circumstances?

From the published literature on the story, it seems only a gnomic male would even ask the question. Minnie Wright may or may not be guilty of murder or manslaughter under the law – then or now. She may or may not have been able to get a “fair trial” – at least then, maybe now too. All of that is irrelevant; for, unless the unknown evidence was shockingly surprising, this is a case where jury nullification at least might be expected. Mrs. Wright poses no further threat to society. She was a broken woman, not likely to mend; and her husband was responsible for her brokenness. Wasn’t it so? Even if the act would not be legally justified or excused, the conscience of the community could say: “Let her go. She has suffered enough.” But is that answer good enough to exonerate Mrs. Peters and Mrs. Hale for “their” law-breaking? To address that question, I turn now to an analysis of the case that Susan Glaspell used as a starting point in creating her story.

(B.) STATE v. HOSSACK

91 The scholarly work has been overwhelmingly done by women, who are universally sympathetic. See Bryan, supra at 85, at 1294 & the collection of authorities, cited at n.6.
92 How anyone could have put a rope around Mr. Wright and strangled him without waking Mrs. Wright, who was sleeping next to him, defies rational explanation. Peers, supra note 22, at 125-26. (“We may have looked as if we didn’t see how that could be, for after a minute she said, ‘I sleep sound.’”)
93 In the Burning Bed case, the jury exonerated the defendant on the tenuous ground of “temporary insanity.” See, McNulty, supra, note 78. Sometimes, it is the State that extends a generous plea bargain, after conviction and reversal, presumably as a way of saying “enough.” After receiving a sentence of 2-6 years on a first degree manslaughter conviction, Leslie Emick, who shot her sleeping husband 5 times in the head, was allowed to plead guilty to “second degree manslaughter and was sentenced to 5 years probation plus community service.” C. P. Ewing, Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill, 14 LAW & HUM. BEHAV. 579, 580 n.2 (1990).
Can a case be made that jury nullification would have been morally appropriate in *State v. Hossack*? We might begin by asking what we know about the circumstances of Mrs. Hossack’s life compared to those of the fictitious Mrs. Wright. Here are the facts of the murder and background circumstances, as we know them from the appellate opinion in the case, supplemented by newspaper reports and some general sleuthing done by Professor Patricia Byan in the 1990’s.94

John Hossack “was killed in his bed on the night of December 2 of the year 1900. He received two blows, either of which was sufficient to cause his death.”95 A sharp instrument opened a five inch gash in his skull. A blunt instrument crushed the skull right below the gash. Mrs. Hossack testified that on that fatal night, “she and her husband went to bed together; she lying in the front.”96 Mrs. Hossack claimed “she was roused from her sleep after midnight by a noise such as would be made by striking two boards together.”97 When she got up to investigate, she heard the front door close. Then she heard groans from her husband, called several of the children down from their bedrooms upstairs, investigated, and found her husband bleeding from the two blows previously described. He died some hours later.98

At the time of John Hossack’s death, he and his wife had been married for thirty-three years. They had nine children, five of whom were still living at home.99 The court found that: “The family life of the Hossacks had not been pleasant, perhaps the husband was most to blame. He seems to have been narrow-minded, and quite stern in his determination to control all family matters.”100 Neighbors testified that for years Mrs. Hossack complained to

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94 *Hossack, supra,* note 22 at 1077; Bryan, *supra* note 85.
95 *Hossack, id.* at 1078.
96 *Id.*
97 *Id.*
98 *Id.* at 1078-79.
99 *Id.* at 1077.
100 *Id.* at 1078.
them about his violent temper.\textsuperscript{101} Once she asked a neighbor to come to her house to “quiet her husband,” who she feared would kill one or more family members.\textsuperscript{102} When the man said he wouldn’t touch Hossack, she replied: “I don’t want you to touch him unless you finish him.”\textsuperscript{103} Furthermore, “She complained at times that he had used physical violence to her, striking her with his hand and with a stove lid.”\textsuperscript{104} One year before Hossack’s death, Mrs. Hossack “left the home, and went to the home of a married daughter.”\textsuperscript{105} Neighbors effected a reconciliation, though that same night in which husband, wife, and children agreed to live peacefully thereafter, Mrs. Hossack “privately requested one of the neighbors to remain all night, expressing the fear that her husband would make trouble again as soon as they were gone.”\textsuperscript{106} Two months after the reconciliation, a neighbor testified that Mrs. Hossack told her “it is just as bad as it ever was.”\textsuperscript{107} That was the last public complaint or comment Mrs. Hossack made about her family life.\textsuperscript{108} Professor Byan adds: “Although they were to change their testimony at trial, several of the Hossack children spoke at the coroner’s inquest and the grand jury hearing about continued quarrelling between their parents during the final year.”\textsuperscript{109} Mrs. Hossack denied there was any trouble at all in the entire marriage, let alone during the year after the reconciliation.\textsuperscript{110} Much was made of her denial that there was any marital discord after the reconciliation.\textsuperscript{111} Clearly, if the couple continued not to get along, this

\begin{footnotes}
\footnotetext[101]{\textit{Id.}}
\footnotetext[102]{\textit{Id.}}
\footnotetext[103]{\textit{Id.}}
\footnotetext[104]{\textit{Id.}}
\footnotetext[105]{\textit{Id.}}
\footnotetext[106]{\textit{Id.}}
\footnotetext[107]{\textit{Id.}}
\footnotetext[108]{\textit{Id.}}
\footnotetext[109]{\textit{Bryan, supra note 85, at 1324.}}
\footnotetext[110]{\textit{Id.} at 1325.}
\footnotetext[111]{\textit{Id.} at 1339-40.}
\end{footnotes}
would give the prosecution the “motive” they wanted to have to convince the jury that Mrs. Hossack murdered her husband.\textsuperscript{112}

This focus on “motive” must have been what inspired Susan Glaspell to invent the “dead bird” in \textit{A Jury of Her Peers}.\textsuperscript{113} Legally, spousal abuse on the husband’s part would not have exonerated a wife who killed him nor, in itself, would it today.\textsuperscript{114} Although the husband may have been guilty of the crime of assault against his wife, at her trial for his murder it would simply become the motive for her act.\textsuperscript{115} That is why Mrs. Hale and Mrs. Peters felt they had to get rid of the evidence of his violence toward the bird, and thus, arguably, against her. Rather than providing a foundation for an excuse defense – as it might today – it would have been very good evidence for the prosecution as to motive.

Sentiment in the community ran largely against Mrs. Hossack before and during her first trial.\textsuperscript{116} She seemed to be a “strong” woman, one who would not allow the male jurors to adopt their usual “chivalry and paternalism” toward “helpless, weak and fragile” women.\textsuperscript{117} Ann Jones has convincingly argued that male jurors of that time were easily persuaded that these latter described women were incapable of hating “their husbands or marriage itself,”\textsuperscript{118} and thus, incapable of killing them.

Much is going on here; none of it easy to assess in thinking about jury nullification. First of all, by definition, nullification depends upon jurors concluding beyond a reasonable doubt that the defendant committed the crime as charged, according to their own factual

\textsuperscript{112} Id. at 1332.
\textsuperscript{113} Id. at 1308.
\textsuperscript{114} No worse abuse could be imagined than that inflicted on Judy Norman by her husband; yet it was not enough to exonerate her. \textit{Norman}, 324 N.C. 253. The case has since been the paradigm for law reform in the area. \textit{See}, \textit{e.g.}, Rosen, \textit{supra} note 79.
\textsuperscript{115} Bryan, \textit{supra} note 85, at 1329-30.
\textsuperscript{116} Id. at 1328-29.
\textsuperscript{117} Id. at 1333.
\textsuperscript{118} Jones, \textit{supra} note 87, at 98, 104, 106-08, 235-47. \textit{See} Bryan, \textit{supra} note 85, at 1333, n. 221.
determinations and the law as explained by the judge.\textsuperscript{119} If male jurors exercise sympathy for women through unselfconscious fear and stereotypical prejudice, the result is not nullification, whatever else it might be.\textsuperscript{120} Apparently, the \textit{Hossack} jury simply applied the law of murder to facts reasonably found, given Mrs. Hossack’s incredible story about the circumstances surrounding the attack on Mr. Hossack. They found her guilty of murder. After a reversal on two evidentiary grounds, a second jury voted nine to three in favor of conviction.\textsuperscript{121} There is no report of any debriefing of the three hold-outs for acquittal. Thus, we do not know why they voted as they did. Public sentiment, so strongly against Mrs. Hossack at the time of the first trial, began to shift subtly in her favor from the day she was sentenced, only five days after the guilty verdict.\textsuperscript{122} Why? Professor Bryan offers several possible reasons for the shift.\textsuperscript{123} One newspaper suggested that Mrs. Hossack was shielding another (maybe one of her children); and did not actually commit the murder.\textsuperscript{124} Some thought there were reasonable doubts, considering “the circumstantial nature of the evidence.”\textsuperscript{125} There were some legal arguments to support this, of course. The appellate court overturned the conviction on the basis of two technical rulings on the evidence; but these rulings did little damage to the prosecution’s case.\textsuperscript{126}

No doubt some people “were affected by the unwavering support of Margaret Hossack’s children, who continued to proclaim their mother’s innocence even after the trial

\textsuperscript{119} This definition is the conventional one. Irwin A. Horowitz, Norbert L. Kerr & Keith E. Niedermeier, \textit{Niedermeier, Jury Nullification: Legal and Psychological Perspectives}, 66 \textit{Brooklyn L. Rev.} 1207, 1208-09 (2001) [hereinafter Horowitz].

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} Bryan, \textit{supra} note 85, at 1355.

\textsuperscript{122} \textit{Id.} at 1345.

\textsuperscript{123} \textit{Id.} at 1345-46.

\textsuperscript{124} \textit{Id.} at 1345.

\textsuperscript{125} \textit{Id.} at 1346.

\textsuperscript{126} \textit{Id.} at 1346-48.
was over.”  Some “may even have begun to acknowledge their own role in what had happened, admitting that they had ignored the dangerous situation that they had known existed within the Hossack household.” Perhaps Susan Glaspell picked up on the sentiment of guilt affecting this group, transferring and intensifying it in the breast of Martha Hale. The most obvious possibility is that many people began to sympathize with Mrs. Hossack, who, by the time of the second trial had been in prison for a year and was a broken woman. One report summed it up this way: “The age of Mrs. Hossack and the unhappiness of her married and home life has awakened favorable sentiment among those who believe her guilty, but held the circumstances to be extenuating.” She was an abused woman, who for years cried out to the community for help. Finding none, she took matters into her own hands. She had suffered enough. Her dead husband was largely responsible for her suffering and her brokenness. No good purpose would be served by jailing her. Professor Bryan tells the rest of the story this way:

Margaret Hossack was not retried. Two weeks after the second trial ended, the Board of Supervisors of Warren County, where the Hossacks had lived, passed a resolution that it would not further aid in her prosecution, stating its desire that the case be dismissed. The county attorney of Madison County, where the second trial was held, stated in a writing to the court that he believed Mrs. Hossack to be guilty of the crime, but he knew of no new or additional evidence that could be produced against Mrs. Hossack, making the “result of another trial … very doubtful.” A year later, he amended his earlier statement to the court, strongly requesting that the case be dismissed, citing the lack of new evidence, the difficulty and cost of getting witnesses to testify yet another time, the publicity surrounding the two earlier trials, and the “advanced years,

127 Id. at 1346.
128 Id.
129 Although speculative, it is a plausible conjecture.
130 Bryan, supra note 85, at 1349-50.
131 Id. at 1355 n. 390 (quoting THE DES MOINES DAILY CAPITAL, Feb. 28, 1903).
and enfeebled condition and appearance,” of Mrs. Hossack. According to his petition, the case against Mrs. Hossack should be dismissed “not because of the innocence of the defendant, but because it will be impossible to secure her conviction.”

If the law would not technically excuse her, the community would show its mercy by letting her go, just as Mrs. Peters and Mrs. Hale, on behalf of a silent and silenced community of her peers, would forgive Mrs. Wright and show her as much compassion as they could. Is that enough? Is nullification justified because the jurors are moved to compassion for one who has “suffered enough?” My answer is “yes,” but that is partly because there are two sides to the equation. The first is that the defendant must truly “deserve” the pity bestowed upon her. She deserves it because she has been a victim herself, one unjustly subjected to a life of physical and mental suffering. The other side of the equation is that the victim of the homicide is the very perpetrator of the offenses against her. In other words, she deserves to be pitied; and although he does not deserve “to be killed,” (though those words are often used in these contexts), he does not deserve to be the vehicle for the further infliction of suffering on her. In short, he has done enough…to her. A duly empowered jury has the power to exonerate the Mrs. Wrights and the Mrs. Hossacks of the world for mercy’s sake or for the sake of justice or for any reason or no reason at all. I move now to the moral right of a criminal jury to ignore the law. What justifies jury nullification?

II. JURY NULLIFICATION

The moral argument for jury nullification has historically rested on the proposition that jurors are entitled to disregard the law and their oaths in order to do justice. This is consistent

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132 Id. at 1355-56.
133 Id. at 1317-19.
134 Evidence of her abuse at the hands of her husband was abundant. Id.
135 Id.
136 For often, the claim of self-defense is a strong one. See Horowitz, supra note 119, at n. 118.
with the idea that citizens generally have a moral right to disregard unjust laws, so long as a
greater harm is not done in the process. Although consistent with the proposition that the
citizen has a right to disregard an unjust law, a juror is a citizen with a special role, and takes
a special oath. Whatever injustice the juror is grappling with, it is not to be contrasted with a
personal moral right. The juror is part of the community’s formal adjudicatory process, and
does have a special responsibility to the law, as we have seen, and will examine in more detail
shortly.

In the two abuse cases we have previously discussed, the “justice” argument is couched
in terms of the community’s compassion for a criminal defendant, herself a victim at the
hands of the ostensible victim of the crime. The killer is therefore forgiven; she has “suffered
enough.” This is “justice” as a sensitive “fit,” taking into account all the particulars of a case,
rather than utilizing a strict rule in a straightforward way. It deliberately uses the idea of
mercy or leniency in making the determination. Some may think mercy and justice
inconsistent notions, but, within any but the most primitive legal systems, they are
complementary ways of making the rule of law work. In his book, *Law and Literature*, 137
Posner produces a long table of “legal antinomies,” including law/justice, law/equity,
law/mercy, and reminds us that the mix of rule and discretion is itself, the very idea of Law. 138

Law is, however, an art, not a mathematical science. At the very dawning of Western
ideas of law, Aristotle introduced the idea of “equity,” a form of justice, one that corrects or
completes the strict rule, which sometimes fails, due to its over or under inclusiveness. 139

Greek orators at the time urged juries to do justice in cases where the exact letter of the law

138 This is Law with a capital “L,” as in the Rule of Law, rather than law, meaning simply a “rule.” Much debate in
the history of jurisprudence is about such distinctions. See LARRY ALEXANDER AND EMILY SHERWIN, THE RULE OF RULES (2001).
139 ARISTOTLE, THE NICOMACHEAN ETHICS 198-220 (Terence Irwin, trans., Hackett Publ’g Co. 1985).
would produce injustice. The idea is to pay closer attention to all the particular facts of a case to see if a sympathetic understanding of “human things” leads the decision-maker to modify the rule, to fine-tune it, because rules are often too general, and no rule-maker can possibly foresee all the particular cases where the rule should not apply. \textit{Lex talionis} for the ancient Israelites, dike for the Greeks, may have been a step forward from the days of disproportionate vengeance, but, particularly as criminal law developed, retribution itself seemed too crude an idea to match the ethical perception that good people brought to bear on particular cases. Contrasting “the world of epieikeia or equity” to dike, Martha Nussbaum says that equity “…is a world of imperfect human efforts and complex obstacles to doing well, a world in which humans sometimes also get tripped up by ignorance, passion, poverty, bad education, or circumstantial constraints of various sorts.”

Strictly speaking, however, it is not the classical Aristotelian doctrine of equity that is at play in matters of jury nullification. Unlike the judge, the jury is ill-equipped by training and ill-suited by role to make the fine legal distinctions necessary to depart from a legal rule via a specific exception, which then takes its place as a new legal rule in the development of

\begin{thebibliography}{9}
\item See Aristotle’s effusive description of the way “equity” should be understood in his \textit{Rhetoric, reprinted in GEORGE C. CHRISTIE, JURISPRUDENCE} 861 (1973) (“Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the men who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or usually been.”).
\item \textit{Id.}
\item \textit{Id.} at 23.
\end{thebibliography}
doctrine.\textsuperscript{146} No. The criminal juror’s role is to do justice, but in a cruder, one-time only way. It is more akin to clemency given by the head of state. It is, in fact, mercy or \textit{clemencia}, as Seneca developed it.\textsuperscript{147} It is mercy, particularized to the case at hand, but unarticulated for the most part, and surely not able to affect the law as rule. Equity is part of the fabric of rule-making, but mercy is part of the checks and balances of a constitutionally healthy system. They are both part of a legal system; but their exercise requires different qualities and a different rationale. The issue is one of role. What is the role of the jury in modern America?

The answer to that question is complex. We have already noted that the jury’s technical function is to find facts and apply the law to those facts. The law is what the judge says it is. Nevertheless, there is a strong tradition in the Anglo-American legal system that the criminal jury has a function beyond the mechanical one described by Coke, as law for judges and facts for the jury.\textsuperscript{148} Lord Devlin said: “Trial by jury is a unique institution.” It is not only “a protection against tyranny. It is that: but it is also an insurance that the criminal law will conform to the ordinary man’s idea of what is just and fair. If it does not, the jury will not be a party to its enforcement.”\textsuperscript{149} We have examined two case in detail – one fictional, the other “real” – where ordinary people may well have determined it would be unjust to further victimize two otherwise innocent persons, who were themselves victims. In summarizing the tradition of such exercises in nullification, Professors Mort and Sanford Kadish said this:

“The landmark cases…in which the jury invoked its power to nullify what were regarded as

\textsuperscript{146}This may or may not have been what Aristotle had in mind. Compare \textit{id. at 28, with RICHARD WASSERSTROM, THE JUDICIAL DECISION 105-13 (1961). The alleged genius of the development of the common law itself is said to have its foundation in the idea that justice nudges rules to change case-by-case. See} Ruggero J. Aldisert, \textit{The Nature of the Judicial Process: Revisited, 49 U. CIN. L. REV. 1, 12 (1980)}

\textsuperscript{147}\textit{EQUITY AND MERCY supra note 143, at 30-34. Alan Scheflin and others have convincingly argued that the very term “jury nullification” misstates what jurors do and have done historically in the common law tradition. The term, “jury mercy,” is more appropriate, say these modern critics. Scheflin, \textit{Mercy and Morals: The Ethics of Nullification, in JURY ETHICS 155 (John Kleinig and James R. Levine eds. 2006) [hereinafter Mercy and Morals].}}

\textsuperscript{148}Harrington, \textit{supra note 4}.

\textsuperscript{149}PATRICK DEVLIN, TRIAL BY JURY 160 (1956).
unjust laws, are invoked not as regrettable departures from the rule of law, but as historic and seminal acts, like Magna Carta and the Bill of Rights, by which men asserted their right to be free of unjust laws.\textsuperscript{150} They added: “… the fundamental function of the jury is not only to guard against official departures from the law, but, on proper occasions, to depart from unjust rules or their unjust application.”\textsuperscript{151} Thus, Kadish and Kadish argue that juries have the liberty to depart from the law articulated by the judge in a criminal case to free a defendant, or lessen the penalty, whenever important considerations of justice weigh heavily in favor of doing so. Their choice of language is instructive here, because they are trying to argue both that jury nullification is “justified” by the system itself (in certain cases), and that it is a good thing that the judge not instruct the jury that it has such power. They want to keep the argument within a positivistic legal and systemic framework, but the subject is ambiguously couched in moral terms. This is a problem Holmes wanted to solve by banishing all moral words from the law.\textsuperscript{152} I believe it is practically impossible to do so, and also undesirable to try; for criminal law is about moral blameworthiness. Moreover, law is about justice, at least aspirationally. Let me now quote the Kadish and Kadish summary view, designed to answer the question: “how is the conscientious juror to understand his role?”

The duty of the jury is indeed to find the facts on the basis of the evidence presented and to return a general verdict by applying those facts to the law as given by the judge. This is the rule, and it imposes an obligation to comply. But the obligation is not absolute. Sometimes considerations of common sense, or considerations of fairness to the defendant, or the jury’s appraisal of the law in contrast to the judge’s statement of it may weigh so heavily that the

\textsuperscript{150} Mortimer S. Kadish & Sanford H. Kadish, \textit{On Justified Rule Departures by Officials}, 59 \textsc{cal. l. rev.} 905, 920 (1971).
\textsuperscript{151} \textit{Id}. at 919.
\textsuperscript{152} Oliver Wendell Holmes, \textit{The Path of the Law}, \textsc{10 harv. l. rev.} 457, 464 (1897).
jury may justifiably depart from the rule requiring it to defer to the judge’s instructions.”

Despite this summary answer, and the use of words like “conscientious” and “justifiable” in describing the role of the juror, Kadish and Kadish do not ask the moral question I am asking. Instead they ask a “legal” question, one based on their attempt to demonstrate that within the positivistic legal system itself, certain rule departures are justified as “legitimated interpositions.” It would take us too far afield to engage their subtle and interesting thesis, and it is unnecessary to do so. Proof that their quest is different from mine lies in the example they themselves give of a “legally” justified interposition by a jury. First, they claim that a juror’s decision based on bribery or on some “personal” interest “abuses his authority,” and is not justified; but then they assert that “a Southern jury that acquits a white segregationist of killing a civil rights worker, on grounds that in the public interest carpetbag troublemakers must be discouraged from venturing into their community” is “an instance of legitimated rule departure.”

This is because their thesis requires that a justified rule departure must meet two criteria: (1) it must be effective, and the official not accountable for the departure; and (2) “the system must set up and make available to the agent who proposes to depart from a rule some set of ends in virtue of which the departure from a rule may truly be justified.” It seems to me, on their own terms, the argument fails in those jurisdictions (the vast majority in the U.S.) where the judge refuses to give an instruction on nullification. It is only when such an instruction is given, that it might be said that the system itself establishes and makes available to juries the legal standards that allow juries – without breaking the law – to depart from the announced rule.

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153 Mortimer S. Kadish & Sanford H. Kadish, Discretion to Disobey 66 (1973)
154 Id. at 68.
155 Kadish & Kadish, supra note 150, at 931.
Kadish and Kadish do not argue that the lack of a sanction on juries alone is enough. The system itself must provide appropriate guidelines. In the three states that presently allow juries to decide questions of law by express constitutional provisions, courts theoretically must give an appropriate instruction on that issue.\textsuperscript{156} Otherwise, the law is clear. The jury does not have the legal right to make such a determination.\textsuperscript{157} Moreover, to find facts otherwise than the jurors actually believe to be the case, is also a violation of their oath. If I agreed with the Kadish and Kadish thesis, I would have to jerry-rig my analysis to fit their complex thesis. But I do not agree; for surely there is no moral justification for Southern juries to nullify murder convictions because the victims were engaging in legitimate political conduct, disapproved on racist grounds by the killers. Kadish and Kadish, of course, do not think they are morally justified either. They simply are arguing that it was “lawful” for those juries to behave that way. I think the straightforward notion that jurors have a legal, and therefore a \textit{prima-facie} obligation to comply with the instructions on the law that the judge gives is the clearer and cleaner starting point. The further notion that jurors may depart from those instructions in the interests of justice is the historic thesis that morally justifies certain jury verdicts; and condemns others. Calling some of those departures from the law “legal” and not “moral” only vaults us back into a jurisprudential debate that obscures more than it clarifies. This point, I think, is made abundantly clear by examining the decision in \textit{United States v. Dougherty},\textsuperscript{158} wherein two articulate judges stated the respective cases for and against allowing the judge to give an instruction to the jury on nullification.

\textsuperscript{156} Schefflin claims and he seems to be right that the courts in Georgia, Maryland and Indiana who do have such provisions, have all but read them out of existence. He claims these are instances of “judicial nullification.” \textit{See Mercy and Morals}, \textit{supra} note 147, at 144-46.
\textsuperscript{157} \textit{Id.} at 131-142.
\textsuperscript{158} 473 F.2d 1113 (1972).
(A.) United States v. Dougherty: a power versus a right

Defendants, anti-Vietnam war protestors, were prosecuted for “their unconsented entry into the Washington offices of Dow Chemical Company, and their destruction of certain property therein.” They were convicted on two counts of malicious destruction and acquitted of burglary charges, but convicted also “on the lesser included offense of unlawful entry.” Defendants appealed on three grounds, one of which was that the judge had refused to instruct the jury on nullification or allow lawyers to argue nullification to the jury. Although the case was reversed on one of the other grounds, the court decided to address the other two grounds in order “(t)o provide an appropriate mandate governing the second trial.”159 Here, we simply focus on the jury nullification issue.

Speaking for the majority, Judge Levanthal made it clear that, because the jury could not be sanctioned for refusing to obey the judge’s instructions, it did possess a “prerogative-in-fact,” not a legal prerogative.160 Citing prominent authorities, the court acknowledged that this power often was exercised in the interest of justice; but, often enough, not. It was equally clear that this was a power not legally condoned. Roscoe Pound approved of a certain amount of “jury lawlessness” because “the law is too often mechanical at a point requiring nicety of adjustment.”161 Judge Leaned Hand had an occasional good word for it, reminding us that the power of nullification “introduces a slack in the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.”162 Against these, and other statements in a similar vein, the court recites the history of the change in the law in 19th century America, from allowing the jury to determine both law and facts to the present nearly universal rule that the

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159 Id. at 1117.
160 Id. at 1130. See also supra note 9 and accompanying text.
161 Id. at 1130 n.32 (citing Roscoe Pound, Law in Books and Law in Action, 44 Am. U. L. Rev. 12, 18 (1910)).
162 Id. at 1130 n.34 (citing United States ex rel. McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942) (Hand, J.)).
facts are for the jury, the law for the judge."  
It also points up the risk this power entails, citing equally impressive authorities, including Pound again, this time to caution that nullification can "hold up instead of uphold the law of the state." The court then offers some practical advice against the suggestion that the jury be told of its power; and ends with a statement of its belief that the jury must only exercise this power as a matter of its own "high conscience," and as a matter of its "own initiative." Understanding nullification as yet another constitutional check on the exercise of power, the court concludes that its rare use "may even enhance, the over-all normative effect of the rule of law."

In dissenting from the majority’s opinion on the issue of nullification, Judge Bazelon agrees that the power is not a legal right. "Nullification is not a ‘defense’ recognized by law," he argued, "but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirement of law where it finds that those requirements cannot justly be applied in a particular case." Thus, Bazelon does not disagree with Leventhal on the issue I am exploring. They even agree on the place “nullification” occupies in the constitutional system itself, as a check against governmental abuse and to give effect to the conscience of the community. Their disagreement comes only in the cost/benefit analysis as to whether there would be more abuse of the power to nullify once it has been transferred into a discretionary right. That would be the result, I maintain, of the judge’s giving an explicit instruction on the power. Judge Bazelon suggests that an instruction may not be necessary if the court would simply allow the lawyers for each side to argue nullification to the jury. Perhaps. But that would still leave the

163 Id. at 1132-34
164 Id. at 1134 n.45.
165 Id. at 1136-37.
166 Id. at 1137.
167 Id. at 1140.
168 Id. at 1144.
conscientious juror to debate whether to violate his or her oath, a problem that the lack of instruction, according to Judge Bazelon, exacerbates. It is not germane to my argument to venture further into this interesting area. Sufficient for my purposes is the understanding that, presently, when the jury engages in nullification, they do so as an act of law-breaking. When that may be justified is, finally, the question I am ready to address.

(B.) Discretion and Role

If the law itself is unjust, or it is unjust as applied specifically to the defendant, then a case may be made that a conscientious juror may nullify. The jury has a unique role in the system. It provides another check, to make sure only the truly blameworthy are convicted and sentenced to a fair punishment. Initially, the legislature sets the parameters for both the definition of the offense and the punishment to be inflicted on an offending party. Of course, the police have discretion not to arrest a given offender. In his seminal study done in the early 1970’s, Professor Kenneth Culp Davis showed the wide variety of reasons why Chicago police refused to arrest a party they had good reason to believe committed a crime. Often it was because the victim asked the police not to. Sometimes it was a matter of using the perpetrator as an informant to catch other criminals. Informal gatherings of family or friends may mean the officer does not arrest for drunkenness or narcotics use. There are many reasons, 

169 Id. at 1141.
170 See Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (“Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence.”).
171 DRESSLER, supra note 81, at 30.
172 KENNETH CULP DAVIS, POLICE DISCRETION (1975).
173 Id. at 8-9.
174 Id. at 28-31.
175 Id. at 12-14.
sometimes nothing more than personal sympathy, laziness, a quick judgment it is simply “not
worth it.” Everyone assumes prejudice of one kind or another sometimes affects these decisions.
Davis was the first to suggest that unchecked discretion was a huge justice problem.\footnote{See, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).} Famously, the American Bar Association Standards Relating to the Administration of Criminal Justice lists a number of reasons why a prosecutor “may in some circumstances … decline to prosecute” without suggesting how this list might work in making actual decisions.\footnote{ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9 (3rd Ed. 1992).} Of course, judges have discretion too; but their discretion is more visibly exercised, and more limited by rules and by adversarial lawyers. In the famous Kalven and Zeisel study, jurors, too, exercised discretion similar to that exercised by police and prosecutors.\footnote{Kalven & Zeisel, supra note 16, at 193-347.} However, unlike police or prosecutors, jurors are told that they may not exercise discretion in freeing criminals or in determining sentencing. They are law-bound.\footnote{See supra note 160 and accompanying text.} Arguably there are good reasons and reasons not-so-good why police, prosecutors, judges and juries do exercise decisions not to enforce the criminal law.

In this article, I am examining only jurors; but it is important to see that some reasons for other exercises of discretion by other officials in the criminal justice are out-of-bounds for jurors. For example, prosecutors sometimes do not prosecute certain offenses because they do not have the resources to do so.\footnote{A well-respected textbook on ethics for lawyers lists “resource constraints” as one of the “[p]rinciple reasons” why prosecutors do not prosecute certain crimes. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 371 (4th ed. 2004).} That reason is not available to jurors, though, of course, as taxpayers and as persons exercising the community’s conscience, they may decide we are spending too much money incarcerating people. This may cause them to nullify, thus freeing a defendant who might otherwise have to serve time in jail. But may they do so, ethically? I think not. At least
they should not for that reason, i.e., to save taxpayer money. They may determine, as a matter of justice, that this particular defendant should not serve jail time – and act accordingly. However the decision not to have the defendant serve time because, as a matter of good social policy, we ought not to be spending so much money on incarcerating criminals is not a matter within their capabilities, and not one within their role. That role is to focus on the individual defendant himself or herself. The roles of the police and the prosecutor are different. They may take other social policies into consideration when they choose not to arrest or not to prosecute a criminal defendant. As we have seen, the role of the criminal jury is to determine whether it believes beyond a reasonable doubt that the prosecutor presented factual evidence that the defendant violated the law as set forth by the court. The moral leeway they have, it seems to me, relates solely to the issue of whether or not this particular defendant should be convicted or should be convicted of this particular offense or should suffer this particular punishment. Mercy for this defendant under these circumstances is the moral issue. In other words, the jury room is not the proper place to attempt to make or alter social policy. To show more particularly why this is so, let us examine the relatively recent debate over race-based jury nullification.

(C.) Race-Based Nullification

In a provocative article, written in the aftermath of the O. J. Simpson trial, Professor Paul Butler argued that “for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison.” He says bluntly that therefore, “… it is the moral responsibility of black jurors to emancipate some guilty

181 See DRESSLER, supra note 81, at 4-5.
black outlaws.”  His goal is “the subversion of the American criminal justice system, at least as it now exists.”  His proposal is to advocate jury nullification by black jurors in non-violent cases involving black defendants. Actually, he advocates three rules for use by black jurors in criminal cases when the evidence convinces the jurors that the defendant is guilty of the crime charged. The first rule is to perform her duty in the usual way by convicting in violent *malum in se* cases. A second rule is to engage in a presumption of acquittal in cases involving nonviolent *malum prohibitum* crimes. Thirdly, Butler suggests there should no presumption either way in cases of nonviolent *malum in se* crimes. Butler particularly emphasizes jury nullification in so-called victimless crimes, like possession of crack cocaine. Critics attacked both Butler’s assumptions and the largely utilitarian calculations he made in predicting the results of his proposals if adopted by the black community.

Citing much of the same evidence as Butler, and some additional evidence, Andrew Leipold casts substantial doubt on Butler’s assertion that black Americans largely support the “radical critique” of the criminal justice system, i.e., that “the justice system is irreparably racist,” and therefore that most black Americans “believe that the current law enforcement scheme is misdirected toward punishment, that too many black defendants are being incarcerated (or are being over-incarcerated), that criminal laws are unfairly administered, and that the political process cannot be trusted to correct these problems.”  Butler’s own summation of the radical critique itself is blunt. He says the criminal law is fundamentally racist “because, like other American law, it is an instrument of white supremacy.”  He thus blames this deep-seated

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183 *Id.*
184 *Id.* at 679-80.
185 *Id.* at 715.
Randall Kennedy suggests that Butler’s reading of the criminal justice system is “static” and “one-dimensional.” It is “totally at odds with what black Americans need and want.” To Kennedy, Butler “perceives blacks as occupying a place in the mind, soul, politics and law of America that is essentially the same as that occupied by their enslaved or segregated forebears.” These criticisms are devastating to Butler’s case; but both Leipold and Kennedy spend little additional time on assessing the moral arguments that Butler offers, based on those assumptions and premises. Instead, both of these critics move swiftly and cogently to demolish the calculations Butler makes regarding what follows from adopting his proposals, even granting him his assumptions and premises. I will not repeat the assessments on these matters made by Leipold and Kennedy, but merely suggest they be read by those interested in that aspect of the debate. Instead, I want to look at Butler’s moral case in more detail, as that is the focus of this essay.

To begin, Butler argues that the radical critique is true; and, it therefore follows that blacks have a special moral right to undermine the system. There is a disconcerting ambivalence in the rhetoric Butler uses in making his arguments. On the one hand, his position seems anarchic; nothing less than “the subversion of American criminal justice” will do. “Through jury nullification,” he writes, “I want to dismantle the master’s house with the master’s tools.” It is strikingly like a claim to revolution, as if blacks were still literally enslaved. He likens the country to a police state, “in which the problem lies not with the citizens of the state, but rather with the form of government or law.” On the other hand, when he comes to making his case for jury nullification itself, the rhetoric is more nuanced. Indeed, he begins by saying: “Any

189 Id.
190 Id.
191 Butler, supra note 182, at 680.
192 Id. at 691.
juror may vote for jury nullification in any case, but, certainly, jurors should not do so without some principled basis.”193 He claims that historical examples of nullification can be divided between those in which the jurors “did the morally right thing,” and those who did not, history itself allowing us to decide which was which.194

Admitting that “jury nullification is subversive of the rule of law,” and “betrays rather than furthers the assumptions of democracy,”195 Butler offers two reasons why black jurors have the moral right to nullify in favor of black defendants. The first is that the Rule of Law is a myth.196 Here he cites the “indeterminacy thesis” of the critical legal theorists to suggest that law is incapable of neutral application.197 This is an odd argument in the context of jury nullification, for it suggests there is no law for anyone to nullify. Indeed, if the judge’s statement of law is always the result of personal or cultural biases, then it stands to reason that any juror’s view is just as good or bad as that of any judge, and the whole edifice crumbles. Of course, even prominent “crits” like Duncan Kennedy,198 do not really believe in the indeterminacy thesis. As it turns out, Butler doesn’t believe in it either. Quickly he slides away from indeterminacy, and cites examples where flatout prejudice rules the day. He begins with slavery. The laws of slavery were hardly indeterminate. They were just immoral because they treated a group of human beings as if they were not human beings. Then he admits that “the rule of law ultimately corrected some of the large holes in the American fabric;” but continues by suggesting these corrections were simply evidence of the law’s “malleability,” not its virtue.199 Again, the changes are what Kennedy and others offer as proof that unjust laws can be made just. Indeed,

193 Id. at 705.
194 Id.
195 Id. at 706.
196 Id.
197 Id. at 707.
199 Butler, supra note 182, at 707.
change is not the same as the indeterminacy’s malleability claim. Butler contradicts himself in the very language he uses. He admits that the rule of law did correct unjust law. So the rule of law can be determinant and laws do sometimes change for the better.

It is Butler’s second point that deserves more attention. Here his claim is that “democracy” has betrayed blacks “far more than they could ever betray it.” His first principle is one widely shared by many moral philosophers: that there is “no moral obligation to obey an unjust law.” He reminds the reader that this principle was a hallmark of Martin Luther King’s leadership and of the many blacks “who practiced civil disobedience during the civil rights protests of the 1950s and 1960s.” What follows, however, betrays a serious misunderstanding of the concept and practice of civil disobedience, as well as its misapplication to the traditions of jury nullification that Butler himself has endorsed.

Regarding civil disobedience, Butler says that “Martin Luther King suggested that morality requires that unjust laws not be obeyed.” Butler stops there; but Dr. King did not. It is true that King endorsed the principle that Butler first endorsed: that there is no moral obligation to obey unjust laws. However, King was working within a tradition (and expanding that tradition) where law-breaking was to be done in a way that actually attested to the allegiance of the law-breaker to the community and to its laws; and that the manner in which the law-breaking occurred put in play the possibility that the law-breaker himself was wrong, even as it gave voice to the moral claim that, indeed, the law-breaker was acting in the interests of justice. Civilly disobedient citizens broke laws openly, non-violently, and were willing to accept punishment at the hands of the state in order to attest to their allegiance to the state and to

\[200\] Id. at 706.
\[201\] Id. at 708.
\[202\] Id.
\[203\] Id. at 708-09.
\[204\] See Lawry, supra note 2, at 708-18.
their own moral positions.\textsuperscript{205} It is not possible to practice civil disobedience in the context of jury nullification. Moreover, if the principles are to be applied to a new situation, then, it is incumbent upon the one arguing for the application to make the case. Instead, Butler blithely suggests that a black juror engages “in an act of civil disobedience” when she acquits a black defendant, guilty of the crime on the evidence, because she believes “there are too many black men in prison.”\textsuperscript{206} In making this choice, “the juror makes a decision not to be a passive symbol of support for a system for which she has no respect.”\textsuperscript{207} However, as Leipold convincingly argues, the “message” the juror sends is hardly a clear one in most cases.\textsuperscript{208} The public – even the judge and lawyers – may not know this is the message being sent. Also, the message is surely not sent clearly because Butler himself agrees that – even under his three proposals – many black jurors would vote to convict many black defendants.\textsuperscript{209} Again, this is not the way to send a message, if it is intended at all to be effective.

What makes Butler’s arguments so problematic is that he constantly resorts to his “radical critique” assumption to support any position he takes. If the system is so bankrupt, so unjust to blacks – as it clearly was in our country under slavery or in South Africa during the apartheid years – then revolution itself would be justified, and the laws would have no moral claim at all. Whether one obeys would simply be a matter of strategy. However, Butler keeps talking specifics, trying to make a moral case within a system he claims has no moral claim on black citizens whatsoever. The traditions within which the arguments are to be made are never taken seriously, because, in the end, he can always opt out, due to his radical critique. This is

\begin{itemize}
\item \textsuperscript{205} Id. at 715.
\item \textsuperscript{206} Butler, supra note 182, at 714.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} See Leipold, supra note 186, at 127 (“…because general verdicts in criminal cases are opaque, any message that the jurors hoped to send can easily be lost.”).
\item \textsuperscript{209} Butler, supra note 182, at 724-25.
\end{itemize}
true in the civil disobedience analogy we just considered. It is more particularly true in the jury nullification tradition directly, to which we now turn.

In the famous cases Butler cites, jury nullification occurred primarily because the jury thought the law was unjust.210 Historically, to this reason a second was added: even if the law itself is just, it had been applied unfairly to this particular defendant.211 Indeed, when jury nullification is praised, these two reasons are sung like a mantra. In the cases Butler proposes for nullification, the law itself is not usually considered unjust. What Butler is complaining about is largely that “the criminal law is unjust when applied to some antisocial conduct by African-Americans: The law uses punishment to treat social problems that are the results of racism and that should be addressed by other means such as medical care or the redistribution of wealth.” 212 These statements themselves make controversial factual and political claims. More to the point, this is not a mere indictment of the criminal justice system, but of the entire fabric of a racist society. The criminal justice system is surely not responsible for the unequal distribution of wealth in this country. Moreover, when Butler claims the criminal law is unjust “when applied to some antisocial conduct by African-Americans,” the natural question is “which conduct?” How can you tell? If it is all the antisocial conduct, then, again, this is not an indictment of the criminal justice system per se. It is a statement that blacks are not responsible for any of their bad acts. Surely Butler doesn’t mean that; yet, when he talks about “Democratic Domination,” it is, again, the argument that “majority rule of whites over African-Americans is, morally speaking, illegitimate.”213 In one telling footnote, he actually dismisses any of the major

210 Surely this is true in three famous cases Butler cites: Bushnell’s Case (religious freedom), the Zenger case (free speech and freedom of the press) and U.S. v. Morris (fugitive slave case). See id. at 701-03.
211 Kalven and Zeisel “found that juries are most apt to nullify when they believe the law itself is fair, but do not believe that this defendant deserves to be punished.” Leipold, supra note 186, at 124.
212 Butler, supra note 182, at 709.
213 Id. at 710.
arguments for a general obligation to obey the law (fair-play, natural justice, or social contract theory) by citing the “radical critique” argument. Still, Butler persists in trying to make a case for moral legitimacy within the context of democratic tradition, while simultaneously undermining those traditions when he finds it useful, by claiming a right to resistance that would surely encompass all of the law.

Butler’s proposals and the context in which they are made suggest a deeper problem. Jury nullification is ill-suited to redress large social and political injustices. Proponents of jury nullification are usually clear about this matter. In Leipold’s words: “… jury nullification is far better equipped for doing individual justice than for carrying out a conscious political campaign.” Finally, it is a question of role, which sharpens moral questions and contextualizes them. Surely, the jury is not a legislature. Even when the jury determines the law and the facts in a case, it acts for that case only; and truly never “makes law.” It simply sometimes refuses to apply law. Thus, the notion that a jury can and should grapple with complex legislative questions is absurd. Again, since Butler claims the opportunity to engage in meaningful political and legislative activity is denied to blacks allows him to ignore this reality. Kennedy and Leipold have shown why Butler’s radical claim is untenable. Moreover if Butler’s claim is right, then the debate about jury nullification has no context. It is just a question of the strategy one chooses to dismantle the system.

CONCLUSION

Jury nullification can be justified in cases where the law itself is unjust or where to convict this particular defendant under these particular circumstances would be unfair. Case by

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214 Id. at 709 n.174.
215 Id. at 127.
case analysis of the kind made in this essay in looking at *A Jury of Her Peers* and *State v. Hossack* is the only way to determine whether or not a particular nullification is morally appropriate or not. Sending broad political messages, divorced from the facts of the case and the moral blameworthiness of the particular defendant and the charge against him or her is not justified moral behavior for a juror.